

TRANSCRIPT OF RECORDS

SUPREME COURT OF THE UNITED STATES

RECORDS OF THE COURT

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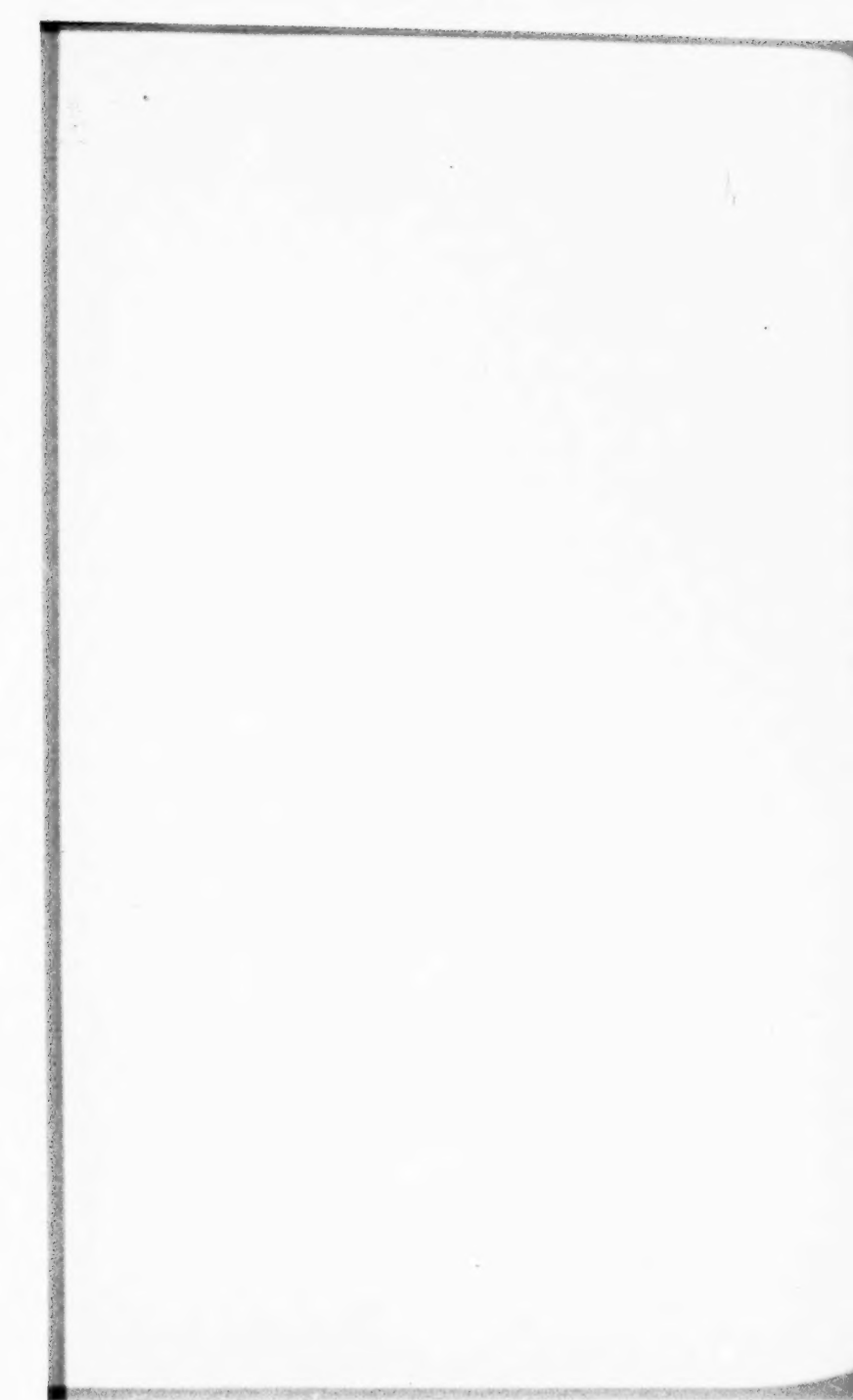
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(25,312)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 491.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO,
PLAINTIFF IN ERROR,

vs.

THE FIRST NATIONAL BANK OF OKEANA, OHIO.

IN ERROR TO THE CINCINNATI SUPERIOR COURT, STATE OF OHIO.

INDEX.

	Original.	Print
Placita	1	1
Petition	1	1
Præcipe for summons.....	3	2
Summons	3	2
Return of summons.....	4	3
Defendant's motion to definitely state and number.....	4	3
Entry overruling motion to definitely state and number.....	4	4
Demurrer of defendant.....	5	4
Entry overruling demurrer.....	5	4
Answer	5	5
Reply	7	6
Demurrer to reply.....	11	8
Entry overruling demurrer to reply.....	11	8
Application for official stenographer filed and allowed.....	11	9
Jury impaneled and sworn.....	12	9
Trial, &c.	12	9
Amended reply	13	10
Verdict	18	14

	Original. Pri
Motion for new trial.....	18
Motion for judgment <i>non obstante veredicto</i>	21
Entry overruling motion for judgment <i>non obstante veredicto</i> ..	22
Entry overruling motion for new trial and reducing verdict of \$26.00; judgment for plaintiff.....	22
Bill of exceptions.....	23
Testimony of Francis W. Earnshaw.....	25
Denis F. Cash.....	90
Francis W. Earnshaw (recalled).....	97
J. G. Gutting.....	116
C. A. Bosworth.....	201
J. G. Gutting (recalled).....	218
F. W. Earnshaw (recalled).....	245
Stipulated testimony of Stanley Ashbrook.....	249
Ferdinand Jelke, Jr.....	249
W. E. Hutton.....	249
Special charges	251
General charge	255
Exhibit 1—Letter from Second National Bank acknowl- edging receipt of draft from Okeana Bank for \$15,000.00	278
2—Okeana Bank draft for \$15,000.00.....	279
3—Letter from Second National Bank to Okeana Bank requesting Okeana Bank to appoint Second National Bank one of Okeana Bank's reserve agents.....	280
4—Credit statement from Second National Bank to Okeana Bank showing credit of \$15,- 000.00	281
5—Second National Bank appointed reserve agent of Okeana Bank; envelope.....	282
6—Notification, dated December 9, 1911, informing Okeana Bank that \$2,500.00 had been loaned to E. E. Galbreath, secured by 11 shares of Second National Bank stock.....	284
7—Notification, dated January 5, 1912, informing Okeana Bank that \$2,500.00 had been loaned to I. Doyle, secured by 12 shares of Second National Bank stock.....	285
8—Notification, dated January 12, 1911, inform- ing Okeana Bank that \$2,000.00 had been loaned to A. A. Hackman, secured by 250 shares of Batesville (Ind.) Bank stock.....	286
9—Credit statement showing note of R. Telker paid	287
10—Notification, dated February 1, 1912, that in- terest on call loans will be 4½ per cent.....	288
11—Notification, dated September 25, 1911, inform- ing Okeana Bank that interest on call loans will be 4½ per cent.....	289

INDEX.

iii

Original. Print

Exhibit 12—Notification, dated October 18, 1911, informing Okeana Bank that interest on call loans will be 5 per cent.....	290	159
13—Notification, dated June 24, 1911, informing Okeana Bank of payment of \$1,000.00 call loan of W. M. Perin.....	291	159
14—Notification, dated March 1, 1912, informing Okeana Bank of payment of Floyd Day \$2,500.00 call loan.....	292	160
15—Notification, dated March 1, 1912, informing Okeana Bank of payment of W. M. Perin \$1,000.00 loan	293	160
16—Notification, dated March 1, 1912, informing Okeana Bank of payment of George W. Black \$2,500.00 loan.....	294	161
17—Notification, dated 3/13/1911, informing Okeana Bank of payment of George Eustis & Co.'s \$2,000.00 loan.....	295	161
18—Notification, dated March 7, 1911, informing Okeana Bank of payment of F. D. Jamison \$2,500.00 loan	296	162
19—Notification, dated February 1, 1911, informing Okeana Bank of payment of interest on F. D. Jamison \$2,500.00 loan.....	297	162
20—Notification, dated February 1, 1911, informing Okeana Bank of payment of R. Telker \$2,300.00 call loan.....	298	163
21—Notification, dated February 1, 1911, informing Okeana Bank of payment of interest on M. R. Bacheln \$2,500.00 loan.....	299	163
22—Notification, dated February 1, 1911, informing Okeana Bank of payment of interest on F. Day \$2,500.00 loan.....	300	164
23—Notification, dated 3/3/1911, informing Okeana Bank of payment of principal of F. Day \$2,500.00 loan	301	164
24—Notification, dated 2/11/1911, informing Okeana Bank of payment of A. Hackman \$2,000.00 loan	302	165
25—Notification, dated February 1, 1911, informing Okeana Bank of payment of interest on A. Hackman \$2,000.00 loan.....	303	165
26—Notification, dated July 14, 1911, informing Okeana Bank of \$2,500.00 loan to Floyd Day, secured by 3,000 Central Mississippi Co. first-mortgage 5 per cent bonds.....	304	166
27—Notification, dated 12/7/1911, informing Okeana Bank of payment of W. D. Henderson \$2,500.00 loan.....	305	166
28—Notification, dated February 8, 1912, informing Okeana Bank of payment of Howard L. Sullivan \$2,000.00 loan.....	306	167

Exhibit 29—Notification, dated January 12, 1912, informing Okeana Bank of loan of \$2,000.00 to A. J. Hassman, secured by 12 shares of Fifth-Third National Bank stock.....	307	1
30—Notification, dated January 12, 1912, informing Okeana Bank of \$2,500.00 loan to W. D. Henderson, secured by 21 shares of Norwood National Bank and 10 shares of Henderson Litho. Co. stock.....	308	1
31—Notification, dated January 6, 1912, informing Okeana Bank of \$2,000.00 loan to Howard L. Sullivan, secured by 150 shares of Provident Savings Bank & Trust Co. stock..	309	1
32—Notification, dated March 21, 1912, informing Okeana Bank of payment of A. J. Hassmer \$2,000.00 loan	310	10
33—Notification, dated February 1, 1912, informing Okeana Bank of payment of interest on various loans heretofore made.....	311	16
34—I. Doyle note.....	312	17
35—Letter from T. P. Kane to board of directors of Second National Bank of Cincinnati, O., criticising condition of Second National Bank	313	17
36—First National Bank draft for \$4,500.00.....	314	17
37—Resolution of Second National Bank's directors of October 18, 1911, authorizing charge off of \$52,029.96.....	315	17
38—Resolution of Second National Bank's directors of May 29, 1911, authorizing charge off of \$16,591.17.....	317	17
39—Resolution of Second National Bank's directors of April 6, 1912, authorizing charge off of \$242,617.05.....	318	17
40—Resolution of Second National Bank's directors of February 23, 1912, authorizing charge off of \$601,405.22.....	320	17
Exhibits 46, 47, 48—Statement of collections and loans on assets criticised in Kane letter.....	323	18
Exhibit 49—Statement of amounts and dates of collections on assets criticised by Kane letter.....	326	186
Exhibit "A"—Reconcilement sheet between Okeana Bank and Second National Bank to January 8, 1912	327	187
"B"—Reconcilement sheet between Okeana Bank and Second National Bank to January 31, 1912	328	188
"C"—Reconcilement sheet between Okeana Bank and Second National Bank to February 9, 1912	329	188

INDEX.

v

Original. Print

Exhibit "D"—Reconciliation sheet between Okeana Bank and Second National Bank to March 31, 1912	330	88
"E"—Reconciliation sheet between Okeana Bank and Second National Bank to April 13, 1912	331	189
"F"—Reconciliation sheet between Okeana Bank and Second National Bank to April 30, 1912	332	189
"G"—Reconciliation sheet between Okeana Bank and Second National Bank to May 31, 1912	333	89
"H"—Reconciliation sheet between Okeana Bank and Second National Bank to July 15, 1912	334	190
Identification "I"—From the books of Stanley Ashbrook, showing sales and market value of Second National Bank stock from December, 1911, to March 25, 1912.....	335	190
Identification "J"—Second National Bank report to Com- ptroller of Currency at the close of business on April 18, 1912	336	190
Notice of filing of bill of exceptions.....	337	191
Notice of filing of bill exceptions returned.....	337	191
Petition in error in court of appeals.....	338	192
Waiver of summons in error.....	343	195
Judgment	343	195
Certificate of court of appeals that Federal questions are in- volved	344	196
Certified copy of entry from supreme court.....	346	197
Opinion, Richards, J.....	347	198
Petition for writ of error.....	353	201
Prayer for reversal.....	364	207
Assignments of error.....	365	210
Bond on writ of error.....	385	220
Writ of error.....	386	221
Citation and service.....	388	222
Cost bill	390	223
Clerk's certificate	391	224

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Petition.

Pleas at the City of Cincinnati, County of Hamilton, State of Ohio, in the Term of May, A. D. 1915, of the Superior Court of Cincinnati, Held by Honorable Stanley W. Merrell, One of the Judges of said Superior Court, in the Separate Session at the Courthouse in the City of Cincinnati, County and State Aforesaid.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO, a Banking Association Organized and Existing under the Laws of United States, America, Plaintiff,

vs.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO, a Banking Association Organized and Existing under the Laws of United States, America, Defendant.

Petition.

Be it remembered, that on the 7th day of June A. D. 1913 came the above named plaintiff, by its attorney, and filed in the office of the clerk of said court its certain petition and precipe herein against the above named defendant, clothed in words and figures following to-wit:

Plaintiff and defendant are both banking associations organized under the laws of United States of America. The plaintiff doing business and located at Okeana, Ohio, and the defendant at Cincinnati, Ohio.

A long time prior to the ninth day of December, nineteen hundred and eleven and thereafter to the date of demand hereafter specified, the plaintiff kept a balance with the defendant, such as is kept by country banks, such as the plaintiff, with banks in large reserve cities, like the defendant. And as part of such business arrangement, and in consideration thereof, the defendant agreed to perform such service as such city banks perform for such country banks, and especially the loaning of surplus funds in its hands belonging to the plaintiff, upon demand and secured by adequate collateral for the plaintiff and account to for the same and interest. That on or about December 9, 1911, the defendant had the sum of five thousand dollars (\$5,000.00) belonging to the plaintiff to be so loaned, and plaintiff directed the defendant to procure such loans to said amount. On the 22d day of July, 1912, plaintiff demanded of the defendant the repayment of said five thousand dollars and interest, which the defendant declined and refused to do.

Wherefore the plaintiff prays judgment against defendant in the sum of five thousand dollars (\$5,000) together with interest thereon from the ninth day of December, nineteen hundred and eleven and

for an accounting by the defendant of the transactions above specified, and for all other relief to which the plaintiff may be entitled.

THE FIRST NATIONAL BANK OF
OKEANA, OHIO,

By DENIS F. CASH, *Their Attorney.*

STATE OF OHIO,

County of Hamilton, ss:

Denis F. Cash, attorney for The First National Bank of Okeana, Ohio, a banking association organized and existing under the laws of United States of America, being first duly sworn, says that the facts set forth in the foregoing petition are true as he verily believes

DENIS F. CASH.

Sworn to before me and subscribed in my presence this 6th day of June, 1913.

[SEAL.]

JOHN H. DRUFFEL,

Notary Public in and for Hamilton County, Ohio.

40¢ due Notary.

3

Precipe.

To the Clerk:

Issue summons in the above entitled cause for the defendant, returnable according to law. Endorse action for money, amount claimed \$5,000, and interest from December 9, 1911 and for relief.

DENIS F. CASH.

June 7, 1913.

Summons Issued.

THE STATE OF OHIO,

Hamilton County, City of Cincinnati, ss:

The Superior Court of Cincinnati.

To the Sheriff of the county of Hamilton:

You are commanded to notify The Second National Bank of Cincinnati, Ohio, a banking association organized and existing under the laws of United States, America, defendant, that it has been sued by The First National Bank of Okeana, Ohio, a banking association organized and existing under the laws of United States, America, plaintiff, in the Superior Court of Cincinnati, and that unless answer by the 5th day of July, A. D., 1913 the petition of the plaintiff against it filed in the Clerk's office of said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 16th day of June A. D. 1913.

Witness my hand and the seal of the said court at Cincinnati, this 7th day of June, A. D. 1913.

[SEAL.]

A. E. B. STEPHENS,
Clerk of the Superior Court of Cincinnati,
By ALBERT SWING, Deputy.

Endorsements on back of summons:
Summons in action for money, amount claimed \$5,000.00 and interest from December 9, 1911 and for relief. To 16th day of June, 1913. Denis F. Cash, Attorney.

Return of Summons.

Filed June 16, 1913.

Cincinnati, June 11, 1913. Served the within named defendant, The Second National Bank of Cincinnati, Ohio, a banking association organized and existing under the laws of United States, America, by delivering a true copy of this writ with all the endorsements thereon personally to F. L. Cook, Vice President thereof, no other chief officer being found in my county.

CHARLES COOPER,
Sheriff of Hamilton County, Ohio,
By GEO. PAUL, Deputy.

Sheriff's fees \$.91.

Motion to Definitely State and Number.

Filed June 17, 1913.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,
vs.
THE SECOND NATIONAL BANK OF CINCINNATI, OHIO.

Comes now The Second National Bank of Cincinnati, Ohio, defendant herein, and moves that the court order the plaintiff to definitely state and number the causes of action contained in his petition.

Min. 811.—Entry Overruling Motion of Defendant to Definitely State and Number.

Entered December 15, 1913.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,
vs.
THE SECOND NATIONAL BANK OF CINCINNATI, OHIO.

The motion of the defendant to distinctly state and number the causes of action contained in the petition coming on to be heard, the court finds the same not well taken and does overrule the same; to which the defendant excepts.

Min. 37—Demurrer of Defendant.

Filed by Leave January 13, 1914.

5

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,
vs.
THE SECOND NATIONAL BANK OF CINCINNATI, OHIO.

Comes now the defendant herein, The Second National Bank of Cincinnati, and demurs to the petition heretofore filed by the First National Bank of Okeana, Ohio, plaintiff herein, on the ground that said petition does not state facts which show a cause of action by reason of the provisions of the laws of the United States.

FERDINAND JELKE, JR.,
JAMES R. CLARK,
LANDON L. FORCHHEIMER,
Attorneys for Defendant.

Min. 716—Entry Overruling Demurrer; Defendant Excepts and allowed Ten Days to Plead.

Entered March 9, 1914.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,
vs.
THE SECOND NATIONAL BANK OF CINCINNATI, OHIO.

This cause coming on to be heard on the demurrer of the defendant, was argued by counsel and submitted to the court, whereupon

the court find that said demurrer is not well taken and does over-
le the same.

It is therefore ordered and adjudged by the court that the de-
urrer filed by the defendant herein be, and the same is hereby over-
ed, to which the defendant excepts, ten days being given to the
endant wherein to plead.

Answer.

Filed March 18, 1914.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,

vs.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO.

The Second National Bank of Cincinnati, Ohio, admits
that plaintiff and defendant are both banking associations
organized under the laws of — United States — America,
ntiff doing business and located in Okeana, Ohio, and defendant
incinnati, Ohio.

he Second National Bank of Cincinnati, further admits that the
ntiff kept a balance with the defendant at the times mentioned
he petition.

he defendant denies that as part of such business arrangement
in consideration thereof it agreed to perform such services as
banks perform for Country banks and especially the loaning of
lus funds in its hands belonging to plaintiff as alleged in its
ion.

efendant says that it undertook to loan surplus funds in its
ls belonging to plaintiff for and on behalf of plaintiff and solely
he accommodation of plaintiff and that it received no considera-
whatever for performing such services.

he defendant admits that on or about December 9th, it had Five
usand (\$5000.00) Dollars belonging to plaintiff to be so loaned
that the plaintiff directed defendant to procure such loan to said
nt.

he defendant alleges that it did on or about December 9th, 1911
the sum of Twenty-five Hundred (\$2500.00) Dollars of the
y belonging to plaintiff as above alleged and that this loan was
after submitted to the plaintiff and in all ways fully approved
nfirmed and ratified by said plaintiff. Defendant alleges that
d again on January 5, 1912, loan Twenty-five Hundred
00.00) dollars of the money belonging to the plaintiff as here-
inabove alleged and that this loan, too, was thereafter in all re-
pects fully ratified and approved of by the plaintiff.

This defendant denies that the plaintiff demanded a repay-
of said Five Thousand (\$5000.00) Dollars and interest on the
day of July, 1912 or at any time, and this defendant says that

the plaintiff did on August 8th, 1912 withdraw all money or credits which money or credits were situated at the Second National Bank.

Wherefore this defendant prays that it may be dismissed hence with its costs herein expended.

FERDINAND JELKE, JR.,
JAMES R. CLARK,
LONDON L. FORCHHEIMER,
Attorneys for Defendant.

STATE OF OHIO,
Hamilton County, ss:

C. A. Bosworth, being first duly sworn, says that he is president of the Second National Bank of Cincinnati, defendant herein, and that the facts stated in the foregoing answer are true as he verily believes.

C. A. BOSWORTH.

Sworn to before me and subscribed in my presence this 18th day of March, A. D. 1914.

[SEAL.]

H. J. SIEBENTHALER,
*Notary Public in and for
Hamilton County, Ohio.*

40¢ due.

Reply.

Filed March 27, 1914.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,
vs.
THE SECOND NATIONAL BANK OF CINCINNATI, OHIO.

Now comes the plaintiff and for reply to the answer of the defendant herein says that on the 9th day of December, 1911, and prior thereto, E. E. Galbreath was the President of the defendant

bank, and that at the said time did conspire with him to defraud the plaintiff; that at the said time, as well as on the

8 12th day of January, 1912, it did conspire with him to defraud the plaintiff of the sum of Five Thousand Dollars (\$5000.00)

and that in pursuance of the said conspiracy did wrongfully deliver to him on the 9th day of December, 1911, the sum of Twenty-five

Hundred Dollars (\$2500.00), taking therefor a note payable and endorsed by the said E. E. Galbreath, pretended to be secured by fif

teen shares of the capital stock of the said defendant, then and there held by him; and thereafter, on the 5th day of January, 1912, and

in pursuance of the said conspiracy, did wrongfully deliver to him the sum of Twenty-five Hundred Dollars (\$2500.00), taking there

for a note payable and endorsed by one I. Doyle; that the said I. Doyle was an employe of the defendant bank, and had no real

interest in the transaction whatever, but signed said note at th

suggestion and upon the request and for the accommodation of the said E. E. Galbreath; that the said E. E. Galbreath pretended the said note to be secured by twelve shares of the capital stock of the defendant, which was then and there held by the said E. E. Galbreath, and thereby the defendant did at the times and in the manner aforesaid appropriate from and charge against the deposit account of the plaintiff the sum of Five Thousand Dollars (\$5000.00); that at the said times, and each of them as aforesaid, the said E. E. Galbreath was insolvent, and that the said shares of stock were worthless, all of which facts the defendant knew at that time, but which said facts were not known to the plaintiff, and could not have been known to it by even the highest degree of diligence.

9 Plaintiff further says that on or about the 9th day of January, 1912, the defendant issued and published to the world and delivered to the plaintiff a sworn statement of its financial condition, from which it appeared that the said defendant's stock was worth more than Two Hundred Dollars (\$200.00) per share in value, and upon such statement it was intended by the defendant that the plaintiff should, and upon which the plaintiff did rely in its dealings with the defendant, but which statement was false and was known by the defendant to be, and its stock was then worthless and was known by the defendant to be, and that at the time of the making of the said loans, as aforesaid, to the said E. E. Galbreath, and the appropriation of the said moneys from the plaintiff's deposit accounts, as aforesaid, and the taking of the said stock as security, the defendant's bank shares were valueless, and that ——— the bank examiner appointed by the United States Comptroller of the Currency, had in the discharge of his duties as examiner, reported to the said Comptroller the fact of the depreciation of the assets of said bank, which depreciation, as reported, subsequently would be at the par value of said stock, and reduced the par value of said stock to nothing; that the said Comptroller had notified the said defendant bank that unless said depreciation of assets were removed, and its full value replaced, he would be compelled to take such steps as to enforce the liquidation of the said bank; that the execution of said threat on the part of the Comptroller was, at the instance of the said defendant, stayed until the 8th day of April, 1912, and that on the 9th day of December, 1911, as well as on the 5th day of January, 1912, said defendant and said Galbreath, its president, with intent to defraud and deceive the plaintiff, did conceal and withhold from the plaintiff that said Galbreath was insolvent, and that the said stock was worthless, and that said Comptroller had taken the action as hereinbefore described, all of which was well known to the defendant, as aforesaid, and did thereby deceive and delude the plaintiff into accepting and approving the said loans, as aforesaid, to the said E. E. Galbreath.

10 Plaintiff further says that said Galbreath has ever since the 9th day of December, 1911, been insolvent and been unable to pay said loans, and that the stock pledged by him, as aforesaid, has ever since been worthless, and that by said deception the defendant fraudulently diverted from the plaintiff a fund on deposit, as aforesaid, in

the sum of Five Thousand Dollars (\$5000.00), with a fraudulent intent to deprive it of said sum, to its damage in the sum of Five Thousand Dollars (\$5000.00).

Wherefore plaintiff prays for relief as in its original petition.

DENIS F. CASH,
Attorney for Plaintiff.

STATE OF OHIO,

Hamilton County, ss:

F. W. Earnshaw, being first duly sworn, says that he is Cashier of the First National Bank of Okeana, and that the facts stated in the foregoing reply are true as he verily believes.

F. W. EARNSHAW, *Cashier.*

Sworn to before me and subscribed in my presence this 26th day of March, 1914.

11 [SEAL.]

L. V. BROWN,
*Notary Public in and for
Butler County, Ohio.*

Min. 110—Demurrer to Reply.

Filed by Leave April 9, 1914.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,
vs.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO.

Comes now defendant herein and demurs to the reply of The First National Bank of Okeana, Ohio, on the ground that on its face it is insufficient in law.

Min. 127—Entry Overruling Demurrer to Reply.

Entered April 21, 1914.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,
vs.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO.

This cause coming on to be heard upon the demurrer of the defendant herein to the reply of the plaintiff, was argued by counsel and submitted to the court.

Whereupon the court, on consideration, overrule the same, to which the defendant excepts.

Min. 744—Application for Official Stenographer Filed and Allowed.

Entered March 24, 1915.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,

vs.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO.

D. F. Cash, attorney for plaintiff, and F. Jelke, Jr., and Peck, Shaffer & Peck, attorneys for defendant, request the services of an official stenographer to make a full report of the testimony and proceedings in this case.

(Signed)

DENIS F. CASH,
FERDINAND JELKE, JR.

12 The above request for an official stenographer is granted and J. B. Faulkner is appointed to make a full report of the testimony and proceedings.

Min. 744—Jury Impaneled and Sworn—Jury Sworn on Voir Dire.

Entered March 24, 1915.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,

vs.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO.

This day came the parties herein, by their attorneys; also came the following named persons as jurors, to-wit:

- | | |
|--------------------------|--------------------|
| 1. Homer P. Thompson, | 7. J. A. Strubbe, |
| 2. Clifford Gordon Neff, | 8. Wm. Moorhead, |
| 3. W. R. Horsley, | 9. J. A. Planz, |
| 4. W. S. Bell, | 10. C. A. Pendery, |
| 5. H. A. Campbell, | 11. F. P. Pollock, |
| 6 Wm. Lange, | 12. Adam Schott, |

who were duly impaneled and sworn herein according to law; thereupon the case came on for hearing upon the pleadings and the evidence and the trial proceeded.

Min. 745—Cause Progressed 1st Day.

Entered March 24, 1915.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,
vs.
THE SECOND NATIONAL BANK OF CINCINNATI, OHIO.

And the jury having heard the testimony adduced and the hour of adjournment having arrived, said cause was continued until tomorrow morning at 10 o'clock.

Min. 748—Cause Progressed 2d Day.

Entered March 25, 1915.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,
vs.
THE SECOND NATIONAL BANK OF CINCINNATI, OHIO.

This day again came the parties herein, by their attorneys; also came the said jurors heretofore impaneled and sworn herein, and the trial proceeded, and the jury having heard the testimony adduced in part and the hour of adjournment having arrived, said cause was continued until tomorrow morning at 10 o'clock A. M.

Min. 751—Cause Progressed 3d Day.

Entered March 26, 1915.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,
vs.
THE SECOND NATIONAL BANK OF CINCINNATI, OHIO.

This day again came the parties herein, by their attorneys; also came the said jury heretofore impaneled and sworn herein, and the trial proceeded, and the jury having heard the testimony adduced in part and the hour of adjournment having arrived, said cause was continued until Monday morning, March 29, 1915, at 10 o'clock.

Min. 752—Amended Reply.

Filed by Leave March 29, 1915.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,

vs.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO.

Now comes the plaintiff and by leave of court first obtained files herein its amended reply to the answer of the defendant and says that on the 9th day of December, 1911, and prior thereto, E. E. Galbreath was the President of the defendant bank, and that at the said time did conspire with him to defraud the plaintiff; that at the said time, as well as on the 12th day of January, 1912, it did conspire with him to defraud the Plaintiff of the sum of Five Thousand Dollars (\$5000.00), and that in pursuance of said conspiracy did wrongfully deliver to him on the 9th day of December, 1911, the sum of Twenty-five Hundred Dollars (\$2500.00), taking therefor a note payable and endorsed by the said E. E. Galbreath, 14 pretended to be secured by fifteen shares of the capital stock of the said defendant, then and there held by him; and thereafter, on the 5th day of January, 1912, and in pursuance of the said conspiracy, did wrongfully deliver to him the sum of Twenty-five Hundred Dollars (\$2500.00), taking therefor a note payable and endorsed by one I. Doyle; that the said I. Doyle was an employe of the defendant bank, and had no real interest in the transaction whatever, but signed said note at the suggestion and upon the request and for the accommodation of the said E. E. Galbreath; that the said E. E. Galbreath pretended the said note to be secured by twelve shares of the capital stock of the defendant, which was then and there held by the said E. E. Galbreath, and thereby the defendant did at the times and in the manner aforesaid appropriate from and charge against the deposit account of the plaintiff the sum of Five Thousand Dollars (\$5000.00); that at the said times, and each of them as aforesaid, the said E. E. Galbreath was insolvent, and that the said shares of stock were worthless, all of which facts the defendant knew at that time, but which said facts were not known to the plaintiff, and could not have been known to it by even the highest degree of diligence.

Plaintiff further says that on or about the 11th day of January 1911 and thereafter during said year 1911, the defendant published to the world and delivered to the plaintiff sworn statements of its financial condition, from which it appeared that the said defendant's stock was worth more than Two Hundred Dollars (\$200.00) per share in value, and upon such statement it was intended by the defendant that the plaintiff should, and upon which the plaintiff 5 did rely in its dealings with the defendant, but which statement was false and was known by the defendant to be,

and its stock was then worthless and was known by the defendant to be, and that at the time of the making of the said loans, as aforesaid, to the said E. E. Galbreath, and the appropriation of the said moneys from the plaintiff's deposit accounts, as aforesaid, and the taking of the said stock as security, the defendant's bank share were valueless, and that — — —, the bank examiner appointed by the United States Comptroller of the Currency, had in the discharge of his duties as examiner, reported to the said Comptroller the facts of the depreciation of the assets of said bank, which depreciation, as reported, subsequently, would be at the par value of said stock, and reduced the par value of said stock to nothing; that the said Comptroller had notified the said defendant bank that unless said depreciation of assets were removed, and its full value replaced, he would be compelled to take such steps as to enforce the liquidation of the said bank; that the execution of said threat on the part of the Comptroller was, at the instance of the said defendant, stayed until the 8th day of April, 1912, and that on the 9th day of December, 1911, as well as on the 5th day of January, 1912, said defendant and said Galbreath, its president, with intent to defraud and deceive the plaintiff, did conceal and withhold from the plaintiff that said Galbreath was insolvent, and that the said stock was worthless, and that said Comptroller had taken the action as hereinbefore described, all of which was well known to the defendant, as aforesaid, and did thereby deceive and de-

16 lude the plaintiff into accepting and approving the said loans, as aforesaid, to the said E. E. Galbreath.

Plaintiff further says that said Galbreath has ever since the 9th day of December, 1911, been insolvent and been unable to pay said loans, and that the stock pledged by him, as aforesaid, has ever since been worthless, and that by said deception the defendant fraudulently diverted from the plaintiff a fund on deposit, as aforesaid, in the sum of Five Thousand Dollars (\$5000.00), with a fraudulent intent to deprive it of said sum, and that it did in fact fraudulently deprive the plaintiff of said sum, to its damage in the sum of Five Thousand Dollars (\$5000.00).

Wherefore plaintiff prays for relief as in its original petition.

DENNIS F. CASH,

E. P. MOULINIER,

Attorneys for Plaintiff.

STATE OF OHIO,

Hamilton County, ss:

F. W. Ernsshaw, being first duly sworn, says that he is Cashier of the First National Bank of Okeana, and that the facts stated in the foregoing reply are true as he verily believes.

F. W. EARNSHAW.

Sworn to before me and subscribed in my presence this 29th day of March, 1914.

[SEAL.]

EDW. MOULINIER,

Notary Public, in and for Hamilton County, Ohio.

Min. 752. Cause Progressed 4th Day.

Entered March 29, 1915.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,
vs.
THE SECOND NATIONAL BANK OF CINCINNATI, OHIO.

17 This day again came the parties herein, by their attorneys;
also came the said jury heretofore impaneled and sworn
herein, and the trial proceeded, and the jury having heard
the testimony adduced and the hour of adjournment having ar-
rived, said cause was continued until tomorrow morning at 10
o'clock A. M.

Min. 754. Cause Progressed 5th Day.

Entered March 30, 1915.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,
vs.
THE SECOND NATIONAL BANK OF CINCINNATI, OHIO.

This day again came the parties herein, by their attorneys; also
came the said jury heretofore impaneled and sworn herein, and
the trial proceeding upon a motion to direct a verdict for the de-
fendant in the absence of the jury, the jury having been excused
until tomorrow morning at 10 o'clock, and the hour of adjourn-
ment having arrived, said cause was continued until tomorrow
morning at 10 o'clock.

Min. 756—Cause Progressed 6th Day.

Entered March 31, 1915.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,
vs.
THE SECOND NATIONAL BANK OF CINCINNATI, OHIO.

This day again came the parties herein, by their attorneys; also
came the said jury heretofore impaneled and sworn, and the trial
proceeded, and the court having heard the arguments of counsel
upon the motion to direct a verdict for the defendant; upon con-

sideration thereof overrules same, and the jury having heard the remaining testimony and the opening arguments of counsel on behalf of plaintiff and defendant having been waived, and the hour of adjournment having arrived, said cause was continued until tomorrow morning at 10 o'clock.

18 *Min. 757—Verdict for Plaintiff for \$5925.00; Cause Progressed 7th Day.*

Entered April 1, 1915.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,
vs.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO.

This day again came the parties herein, by their attorneys; also came the said jury heretofore impaneled and sworn herein, and the trial proceeded, and the jury having heard the charge of the court retired to their jury room in charge of the court constable for deliberation. And now comes said jury into open court with their verdict in writing signed by each of said jurors concurring therein and say:

We, the jury on the issues joined, find for the plaintiff and assess its damages at Five Thousand Nine Hundred and Twenty-five Dollars (\$5925.00).

(Signed.)

HOMER P. THOMPSON.
ADAM SCHOTT.
JOHN A. PLANZ.
W. S. BELL.
WILLIAM LANGE.
FRANK R. POLLOCK.
WM. MOORHEAD.
W. R. HORSLEY.
C. A. PENDERY.
H. A. CAMPBELL.
J. A. STRUBBE.

Motion for New Trial.

Filed April 2, 1915.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,
vs.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO.

Now comes the defendant, The Second National Bank of Cincinnati, Ohio, and moves the Court to set aside the verdict and for a new trial herein for the following reasons:

First.

The court erred in rejecting evidence offered by defendant to which rulings of the court the defendant at the time duly
19 excepted.

Second.

The court erred in admitting evidence offered by the plaintiff to which ruling of the court the defendant at the time duly excepted;

Third.

The court erred in admitting evidence offered by the plaintiff to which ruling of the court the defendant at the time duly excepted; which said ruling deprived this defendant of a title, right, privilege or immunity claimed by the defendant under Sections 5147, 5211 and 5239 of the Revised Statutes of the United States.

Fourth.

The court erred in refusing to grant a motion made on behalf of defendant at the close of the plaintiff's evidence to instruct the jury to return a verdict for the defendant to which ruling of the court the defendant duly excepted.

Fifth.

The court erred in refusing to grant a motion made on behalf of defendant at the close of the plaintiff's evidence to instruct the jury to return a verdict for the defendant and by said ruling the court deprived the defendant of a title, right, privilege or immunity which said defendant claimed under Sections 5134, 5136, 5190 and 5155 of the revised statutes of the United States.

Sixth.

The court erred in refusing to grant a motion made on behalf of defendant at the close of all the evidence to instruct the jury to return a verdict for the defendant to which ruling of the court the defendant duly excepted.

20

Seventh.

The court erred in refusing to grant a motion made on behalf of defendant at the close of all the evidence to instruct the jury to return a verdict for the defendant and by said ruling the court deprived the defendant of a title, right, privilege or immunity which said defendant claimed under Sections 5134, 5136, 5190 and 5155 of the Revised Statutes of the United States.

Eighth.

The court erred in refusing to grant written instructions on matters of law to the jury which said written instructions were offered to the court and were requested to be given to the jury when the evidence was concluded and before the argument to the jury was commenced to which ruling of the court the defendant at the time duly excepted.

Ninth.

The court erred in its charge to the jury, to which defendant excepted.

Tenth.

In its charge to the jury the court charged the jury in such a way and in such a manner as to deprive the defendant of a title, right, privilege or immunity claimed by the defendant under Sections 5147, 5211 and 5239 of the Revised Statutes of the United States; to which charge of the court the defendant at the time duly excepted.

Eleventh.

The court erred in its charge to the jury in that it charged the jury to such effect that it deprived the defendant of a title, right, privilege or immunity claimed by the defendant under Sections 5134, 5136, 5155 and 5190 of the Revised Statutes of the United States; to which charge of the court the defendant at the time duly excepted.

Twelfth.

The verdict of the jury was contrary to law.

Thirteenth.

The verdict is contrary to law in that it deprives this defendant of a title, right, privilege or immunity claimed by this defendant under Sections 5134, 5136, 5155 and 5190 of the Revised Statutes of the United States.

Fourteenth.

Other errors apparent on the record to which errors the defendant at the time and times respectively duly excepted.

JELKE, CLARK & FORCHHEIMER,
PECK, SHAFFER & PECK,
Attorneys for Defendant.

Motion for a Judgment Non Obstante Veredicto.

Filed April 2, 1915.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,
vs.
THE SECOND NATIONAL BANK OF CINCINNATI, OHIO.

Now comes the defendant The Second National Bank of Cincinnati, Ohio, and moves the court for a judgment herein non obstante veredicto on the ground that the verdict of the jury impaneled in the above entitled cause is contrary to law and on the further ground that said verdict of said jury deprives this defendant of a title, right, privilege or immunity claimed by this defendant under sections 5134, 5136, 5155 and 5190 of the Revised Statutes of the United States.

PECK, SHAFFER & PECK,
JELKE, CLARK & FORCHHEIMER,
Attorneys for Defendant.

Min. 418—*Entry Overruling Motion for Judgment Non Obstante Veredicto.*

Entered May 10, 1915.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,
vs.
THE SECOND NATIONAL BANK OF CINCINNATI, OHIO.

This cause came on to be heard upon the motion for a judgment non obstante veredicto, and was submitted to the court.

The court being fully advised in the premises, doth hereby overrule said motion, to all of which The Second National Bank of Cincinnati, Ohio, does hereby except.

Min. 418—*Entry Overruling Motion for New Trial and Reducing Amount of Verdict \$26.00; Judgment for Plaintiff for \$5,899.00 and Costs.*

Entered May 10, 1915.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,
vs.
THE SECOND NATIONAL BANK OF CINCINNATI, OHIO.

This cause came on to be heard upon the motion to set aside the verdict herein and for a new trial, and was submitted to the

Exhibit #33	62
Exhibit #34	68-9
Exhibit #35 (offered)	73
(admitted)	149
Exhibit #36	73
Exhibits (Id.) #37, #38 and #39 (offered)	117
(admitted)	220
Exhibit (Id.) #40 (offered)	118
(admitted)	220
Id. #41	184
Id. #42, #43, #44, and #45	192
Exhibits (Id.) #46, #47, and #48 (offered)	198
(admitted)	226
Exhibit #49	226
Exhibits A, B, C, D, E, F, G, and H	54
Id. I	225
Id. J	226
Published statements of Second National Bank	82-5
Letter of Comptroller, dated April 15, 1912	94

25

Bill of Exceptions.

Superior Court of Cincinnati.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO, Plaintiff,

vs.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO, Defendant.

Appearances:

Denis F. Cash, Edward Moulinier, Counsel for the Plaintiff.

Jelke, Clark & Forcheimer, John Weld Peck, Counsel for the Defendant.

Be it remembered that at the trial of this cause at the March, 1915, Term of the said Superior Court of Cincinnati, before the Honorable Stanley W. Merrell and a jury empaneled to try the same upon the issues joined, the following was introduced to-wit:

Morning Session.

March 24, 1915—10:00 o'clock.

Thereupon the plaintiff, to maintain the issues upon its part, offered the following evidence, to-wit:

FRANCIS W. EARNSHAW, being first duly sworn, testified in behalf of the plaintiff as follows:

Direct examination.

By Mr. Cash:

Q. Mr. Earnshaw, your full name is what?

A. Francis W. Earnshaw.

Q. Where do you live?

26 A. Okeana, Ohio.

Q. Where is Okeana, Ohio?

A. In the western part of Butler County, near the Indiana line.

Q. How close to the city of Hamilton?

A. About twelve miles, twelve or fifteen miles.

Q. What is The First National Bank of Okeana, what kind of an institution is it?

A. It is a national bank, chartered under the national banking laws.

Q. What is its capitalization?

Counsel for defendant objected; objection sustained, to which counsel for plaintiff excepted and avowed that, if the witness were permitted to answer, he would state that its capitalization is \$25,000.

Q. What position do you occupy with The First National Bank of Okeana?

A. Cashier.

Q. How long have you been cashier?

A. About six years, ever since the organization.

Q. Who were the other officers of the bank?

A. Mr. Charles Wagner is president, Mr. Edwin Heep, vice-president, Mr. J. A. Butterfield, vice-president, and myself cashier.

Q. What are your duties as cashier of that bank, what have they been since the beginning?

A. The usual duties along that line.

Q. Just explain to the jury what they are?

27 A. Well, I keep the books, look after the loans, and do practically all the work that there is to be done there.

Q. Are any of the other men that you speak of actively engaged in the banking business?

A. No, sir.

Q. Are they engaged in other lines of business?

A. All of them.

Q. Now, when was it, Mr. Earnshaw, if you can tell, that you first had business with The Second National Bank of Cincinnati?

A. Well, it is about January, 1911, I believe, the early part of it or sometime in January.

Q. Just tell the jury what that was?

A. We had a surplus of funds. We did business with the First National Bank of Cincinnati, had a surplus of funds, desired to have some call loans, and they couldn't accommodate us at that time.

Counsel for defendant objected; objection overruled, to which counsel for defendant excepted.

A. (continued.) So we made arrangements with the Second National Bank to open an account with them.

Counsel for defendant objected, and the objection was sustained. The Court: That will go out as it stands. That can be put in in the form of the exact dealing.

Counsel for plaintiff excepted to the ruling of the Court.

Q. Now, under the Court's ruling, just state what was said and what was done in your dealing with the Second National Bank in the opening of this account that you speak of,—who was present, with whom you had the dealing?

28 A. I called on Mr. Galbreath at his residence; spoke to him about opening an account. He agreed that he would allow us two and a half per cent on the average daily balance, and would take for us call loans.

Counsel for defendant moved that that part of the preceding answer in reference to taking call loans be stricken out, because it is not within the power of a national bank to do so; and the objection was overruled; to which counsel for defendant excepted.

Q. Did the Second National Bank make call loans for you after that?

A. Yes, sir, right along.

Q. Have you got a list of those call loans here?

A. I have our ledger showing the list.

Q. How many call loans would you say there were after that arrangement was made?

A. Immediately after, four or five or six within just two or three days.

Q. Did the Second National Bank allow you any interest on your deposit?

A. Yes.

Q. How much?

A. At the rate of $2\frac{1}{2}$ per cent on the average daily balance.

Q. You mean after this arrangement or talk that you had with Mr. Galbreath, after the talk you had with him?

A. Yes, sir, that was when we opened the account, when we had the talk with Mr. Galbreath.

Q. I show you a letter dated January 11, 1911, and ask you from whom you received that letter, and where it has been since you received it?

A. I received it from Mr. Galbreath as president of the bank.

Q. Second National Bank?

A. Second National Bank.

Mr. Cash: I want to offer this letter if Your Honor please, in evidence.

The said letter was admitted in evidence, was read to the jury, and is attached hereto as part hereof, marked Ex. #1.

Q. Now, this letter, Mr. Earnshaw, refers to a draft of \$15,000. Will ask you whether that is the draft that you referred to?

A. Yes, sir.

Mr. Cash: We offer that in evidence.

The said draft was admitted in evidence, read to the jury, and attached hereto as part hereof, marked Ex. #2.

Q. I show you another letter with the same signature, and as you if you received that in the same way?

A. Yes, sir.

Mr. Cash: We offer that in evidence.

The said letter was admitted in evidence, read to the jury, and attached hereto as part hereof marked Ex. #3.

Q. Now, Mr. Earnshaw, when you sent this draft to them \$15,000 you got a receipt for it?

A. Yes, sir.

Q. I will ask you whether that is the receipt?

A. That is it.

Mr. Cash: We offer that in evidence.

30 The said paper was admitted in evidence, read to the jury and is attached hereto as part hereof, marked Ex. #4.

Q. That came to you from the Second National Bank?

A. Yes, sir.

Q. Now, that letter of the 9th speaks of a card, signature can have you that?

A. No, that was mailed to the Second National Bank.

Q. It also speaks of a reserve bank. I will ask you whether this is that paper or——

A. That is an acknowledgement from the Comptroller of the Currency that they received the reserve bank.

Q. This letter requesting you to send that on to the Comptroller——

A. We mailed the blank to the Comptroller.

Q. What did you receive in return?

A. This letter (indicating).

Mr. Cash: I offer that in evidence.

Counsel for defendant objected; objection overruled, to which counsel for defendant excepted.

The said letter was admitted in evidence, read to the jury, and attached hereto as part hereof marked Ex. 5.

Q. This last letter that I have offered, Mr. Earnshaw, from the Comptroller of the Currency, approves the Second National Bank as one of your reserve banks?

A. Yes, sir.

Counsel for defendant objected.

Q. I want to ask you to explain to the jury just what that means?

31 Counsel for defendant objected, and objection sustained.

Q. What is the meaning of "a reserve bank?"

Counsel for defendant objected, and the objection was overruled, to which counsel for defendant excepted.

A. The law compels us to carry a certain per cent of our deposits either in the safe or with a reserve bank, six per cent in our safe and nine per cent with our reserve banks; and they approved the Second National Bank as one of our reserve banks.

Q. Is that, you say, one of your reserve agents?

A. Yes, sir.

Q. Did you have a number of others at the same time?

A. We had with the First National Bank in Cincinnati and the Hanover National in New York.

Q. At that time?

A. At that time, yes.

Q. I think you said that two per cent or two and a half per cent was paid on your reserve?

A. Yes.

Q. Or is that on your reserve daily balance?

A. That is on the average daily balance that we carried there.

Q. Might that amount of money that you carried there be more or less than your reserve?

A. Oh, yes. Well, you see, we did not carry any particular amount of reserve with them. We were allowed to do that in making our report, on our reserve fund our balance was founded.

Q. Together with what you had on deposit?

A. To what we had with the other banks.

32 Q. I want to ask you, Mr. Earnshaw, whether or not from your experience as a banker, cashier of a bank, as you are and have been for a number of years, whether or not there is or is not a well-defined custom as to what the reserve bank shall do for the depositing bank?

A. Yes.

Q. By way of loaning money for them.

A. They do that right along.

Counsel for defendant objected, and moved that the preceding answer be stricken out; objection overruled, to which counsel for defendant excepted.

Q. What is the custom as to the matters that I have asked you about?

Counsel for defendant objected; objection overruled, to which counsel for defendant excepted.

Q. —as to loaning money?

A. They take those call loans for us, advise us that they have taken a certain loan with certain collateral and charged our account with same, that they are holding the loan in their vaults subject to our order.

Counsel for defendant moved that the preceding answer be stricken out.

The Court: What is the custom among banks?

A. All the banks that I know anything about do that way.

Q. I will ask you whether that was the course of business between banks, as you have described it, before your transaction with the Second National Bank?

A. Yes, sir.

33 Q. I will ask you whether that is the course of business between such banks since that day?

A. Yes, sir.

Q. And is now?

A. Yes, sir.

Q. Now, then, I show you a draft, Mr. Earnshaw, by which you paid \$15,000 to the Second National Bank on January 9. Was that your first transaction with them?

A. Yes, sir.

Q. Now, in the letter that follows on the 11th it speaks of \$12,000. What \$12,000 does it refer to there, or what money is that?

A. That is a portion of this \$15,000. We asked them to place this on call loans.

Q. What became of the other \$3,000?

A. That was left with them in the course of business on deposit.

Q. Tell the jury whether or not they did place this \$12,000 for you in call loans?

A. I can refer to my ledger and see the amount that was placed. They placed on the 14th of January—possibly it showed on their book as the 13th—something over \$11,000 on call loans for us.

The Court: That is 1912 all the time?

A. 1911.

Q. That is January of 1911?

A. Yes, sir.

Q. Now, did they make other call loans for you from that fund that you had on deposit with them after that and before the 9th of December of the same year?

34 A. Well, it would be hard to say whether that was the same fund or not. We were depositing and withdrawing it right along. We made other deposits after that, after those loans were made.

Q. Did you have any other fund on deposit except in that particular account with them?

A. No.

Q. Coming down to December 9th: did they loan some money for you on December 9th?

A. 1911, yes.

Q. How much money?

A. \$2,500.00.

Q. Now, let me ask you, Mr. Earnshaw, at the times that they made these various call loans for you, how or in what way did they notify you that they had done so, if at all?

A. They had regular forms that they used for that.

Q. I will ask you to look at that and state to the court and jury whether that is the form that they used in notifying you?

A. Yes, sir.

Q. What is that paper that I have shown you, and what do you call that? Has it any name?

A. None that I know of, simply a notice that they had taken for certain loans.

Q. That particular paper, where did that come from, where did you receive that from?

A. From the Second National Bank.

Mr. Cash: I want to offer that in evidence.

The said paper was admitted in evidence and is attached hereto as part hereof marked Ex. #6.

Q. That is the paper you referred to previously?

A. Yes.

Q. Did the Second National Bank in the various loans that they had made for you always report to you in that way by a similar paper?

A. So far as I can remember, yes, sir.

Q. I will ask you whether or not the Second National Bank sent that note referred to in this paper (Ex. #6) to you or what was done with that?

A. He was filed in their vaults I suppose. We didn't get it.

Q. They didn't send it to you?

A. No.

Q. Nor to your bank?

A. No.

Q. Who was Mr. Gutting?

A. He was cashier of the Second National Bank.

Q. Now, I show you another similar paper, and ask you whether not you received that from the Second National Bank in the same way?

A. Yes, sir.

Mr. Cash: We offer that in evidence.

The said paper was admitted in evidence, read to the jury, and attached hereto as part hereof marked Ex. #7.

Q. Was Mr. Gutting the same gentleman that you have spoken of?

A. Yes, sir.

Q. Was this note and the collateral sent to you with this notice?

A. No, sir.

Q. Did you have it at any time?

A. Not until we asked for it at the time.

Q. Well, it wasn't sent with this notice?

A. No, sir, never sent.

Counsel for defendant objected on the ground that the question was leading; objection overruled, to which counsel for defendant excepted.

Q. Who was I. Doyle referred to in this paper?

A. She was a stenographer in the bank at one time.

Q. Did you know who I. Doyle was at the time this loan was made?

A. No, sir.

Q. When did you learn who she was?

A. At the time we asked for the loans, or a little later than that we were told at that time it was a broker loan.

Q. Who told you that?

A. Mr. Gutting told us it was a broker loan.

Counsel for defendant moved that the preceding answer be stricken out.

The Court: When was this? It is not definite as to the time.

Q. Well, can you give us the date or about the date?

A. It was the day that it came out in the paper that the Second National Bank was in the hands of the Clearing House. It was sometime in April. I can't give you the exact date.

Q. Where did you see Gutting at that time?

A. At the bank, at the Second National Bank.

Q. What office did he occupy at that time, what official position?

37 A. He was cashier.

Q. You had a talk with him about this Doyle matter?

Counsel for defendant objected upon the ground that it is leading. The Court: Has he already testified to this?

Mr. Cash: That he had a conversation. I just asked him what did he say, what was the conversation that you had with Mr. Gutting about it.

The Court: There has been an objection interposed, and I want to keep the time certain so that I can be advised.

Mr. Cash: He does not know the date exactly. He said it was after it came out in the paper that the bank was in the hands of the Clearing House. That was about the 13th of April.

Q. I asked what the conversation was with Mr. Gutting?

A. I asked him about the loans——

Counsel for defendant objected on the ground that there was no authority from the bank to Mr. Gutting to discuss this matter at all, and that the bank can not be bound by what he said; and the objection was overruled, to which counsel for defendant excepted.

A. He said he didn't know, that he thought it was a broker loan. That is all he would say at that time. He said he was very busy.

Q. Did you see him again in reference to it?

A. Some days later, yes.

Q. Did you have a talk with him at that time about it?

A. At that time he advised us that he thought it was a Galbreath loan, but he couldn't be certain. He thought it was one of Mr. Galbreath's loans, but he was not certain.

38 Q. Did you have any talk with anybody in the bank about it other than Mr. Gutting?

A. I spoke to Mr. Telker, the assistant cashier. He told me at that time it was a Galbreath loan.

Mr. Peck: This time has never been fixed by the witness.

Q. A day or two after the first?

The Court: When was it?

A. At the time I spoke to Mr. Telker the same day it came out here in the paper, the same day I was down here.

The Court: The same day you talked to Gutting?

A. Yes.

The Court: When was that?

A. I think it was on Monday.

Judge Jelke: Monday, the 13th?

A. I don't know.

Q. Do you remember what day of the week it was?

A. I think it was on Monday.

Q. Did you say that is the day after or the day before it came out in the paper?

A. That was the first I saw it in the paper on that morning, in the Enquirer.

Q. I will ask the witness whether these notices (indicating) were received by the First National Bank of Okena from the Second National Bank in the same way that the others were that he has identified?

39 Counsel for defendant objected; objection overruled, to which counsel for defendant excepted.

A. Yes.

Mr. Cash: There are twenty-four of them in all, I think, from January 12, 1911, up to March 21, 1912. We offer them in evidence.

The said notices were admitted in evidence, and are attached hereto as part hereof marked Exhibits Nos. 8 to 32, respectively.

Q. Mr. Earnshaw, — if ever, did you get these two notes from the bank with the collateral?

A. The same day that I was down there, it was that same Monday.

Q. The same Monday?

A. In April.

Q. What did you get from the bank at that time?

A. We got the two notes with the collateral, the I. Doyle note and the E. E. Galbreath note.

Q. What became of them?

A. They were turned over to you.

Q. And that is the last you saw of them?

A. That is the last I seen of them.

Q. You don't know what has become of them of your own knowledge since then?

A. No.

Counsel for defendant objected because leading.

Q. Do you know of your own knowledge what has become of them?

A. No, sir.

Q. I hand you a note dated January 31, 1908, and ask you to state whether that is a copy of the Doyle note?

40 A. Yes, that is.

Mr. Peck: I would like to make this objection,—that this is a copy, to have him state when and how this copy was made, or the basis of his identification, if it is a copy.

The Court: Can you do that, Mr. Earnshaw?

A. I wrote Mr. Cash. I asked for a copy, and he mailed that to me.

Mr. Peck: Then I move that it be stricken out.

Q. You have not compared that with the original?

A. With the original, no.

The objection of counsel for defendant was sustained, and the answer of the witness to the effect that the paper is a copy was stricken out.

Q. Mr. Earnshaw, when, if at all, did your bank make a call on the Second National Bank for the payment of these two loans that I have called your attention to?

A. Sometime in April—

Counsel for defendant objected.

Q. What did you do, Mr. Earnshaw?

A. I wrote to the Second National Bank asking them to call those two loans.

Counsel for defendant objected.

The Court: Where is that letter?

Mr. Cash: You have the letter.

Mr. Peck: We never had any such letter.

Mr. Cash: You had it all right.

Q. Did you keep a carbon copy of the letter, Mr. Earnshaw?

A. No, sir.

41 Q. Was the letter typewritten or not?

A. Written by hand. We had no typewriter at that time.

Q. You didn't make but one copy?

A. One letter, one copy.

Q. Or rather one original?

A. Yes.

Q. What was the date of that letter?

A. It was in April of 1912. The exact date I couldn't give.

Q. Is there anything on your books that would refresh your memory as to the date?

A. It would give the probable date. I might miss it a day or two. It would be sometime near the 11th of April.

Q. It would be sometime near the 11th of April. What year?

A. 1912.

Q. Did you write the letter?

A. Yes, sir.

Q. To whom was it addressed?

A. To the Second National Bank, Cincinnati, as near as I can remember. That is the way we addressed all our letters at that time.

Q. Did you mail it?

A. Yes, sir.

Mr. Peck: I would like to cross examine on the voir dire, if I may, about this letter.

Mr. Cash: All right, go ahead.

Cross-examination on the voir dire.

By Mr. Peck:

Q. You did have a typewriter at that time, didn't you, Mr. Earnshaw?

42 A. I don't think so.

Q. Why. I show you a letter of March 19th, 1912, signed by you, isn't it?

A. Yes, sir.

Q. Well, then, you did have a typewriter at that time, didn't you?

A. I surely did.

Q. Your correspondence with the Second National Bank at that time was typewritten, wasn't it?

A. It looks that way, yes, sir.

Q. Well, didn't you ever keep a copy, carbon copies of your letters there?

A. No, sir.

Q. And your correspondence business?

A. I didn't at that time. I do now. I just had a new typewriter; at that time I thought I didn't have it.

Q. Haven't you a copy of this letter which I just handed you?

A. I don't think I have.

Q. Isn't that, now, the letter that you referred to and the only one that you wrote about these loans, written on March 19th?

A. No, sir.

Q. Now, have you any record at all of this letter that you are speaking of?

A. No, sir.

Q. Didn't you make any memorandum of it at any time?

A. No, sir.

Q. Nor a copy?

A. No, sir.

3 Q. Well, how was this letter addressed?

A. I can only go from memory, "The Second National Bank, Cincinnati," I suppose.

Q. Who addressed it?

A. I did, but I can't remember every letter that I addressed.

Q. Did you mail it?

A. Yes, sir.

Q. In the mail yourself?

A. Yes, sir.

Q. You recollect that, do you?

A. Yes, sir.

Q. How do you know that?

A. I mailed the letters that were mailed. I don't remember any particular one. I mailed them all.

Q. You don't remember, then, depositing this particular letter in the mail?

A. Well, I couldn't say that particularly, no.

Q. Have you any answer to that letter?

A. I had one.

Q. Well, have you it now?

A. That was turned over to Mr. Cash.

Mr. Peck: If you can produce an answer to that letter, why, of course, that objection would be overcome.

Mr. Cash: I wish I could, but I can't. I told you that I had the fire. I had it.

Direct examination continued.

By Mr. Cash:

Q. You say you got an answer to that letter?

44 A. Yes, sir.

Q. That answer was turned over to me?

A. Yes, sir.

Counsel for the defendant objected.

Mr. Cash: Let it go out. We have asked you I think for the letter.

Mr. Peck: We have no such letter. We can't find it and don't believe there ever was such a letter as far as I know.

Q. What was that letter, Mr. Earnshaw, that you wrote?

A. Asking them to call the two loans.

Q. State the substance of it as nearly as you can?

A. I couldn't do it.

Q. Just as nearly as you can.

A. I suppose, "Please call for us the loan of E. E. Galbreath——"

Counsel for defendant objected.

Q. What is your recollection?

A. I couldn't remember the exact words.

Q. I am not asking for the exact words, I am asking for your recollection, your best recollection?

A. To please call for us the loan of E. E. Galbreath and I. Doyle.

Q. Is that the letter, now, that you have referred to, when you speak of getting an answer to some letter?

A. Yes.

Q. Now, tell us when you got that answer?

A. Oh, it would be just within a day or two after that.

45 Q. You haven't that answer?

A. No.

Q. I would ask you to state in substance what that answer was

A. That he could not get in touch with the parties at that time, but would keep right after them and advise us as soon as he could do anything.

Q. Did you take any other measures to collect those two notes, and if so what?

A. After we received the notes I spoke to Mr. Galbreath, and he was in a very big hurry at the time.

Q. No, I mean before you came down here.

A. Before I came down. No.

Q. Was there any draft drawn on anybody?

A. We drew a draft on the Second National Bank for \$4,500.

Q. Through what bank?

A. The First National Bank in Cincinnati.

Q. When was that?

A. The same day we called the loan.

Q. What do you mean by saying the same day, the same day as that?

A. The date of the letter, it was in April.

Q. What became of that draft?

A. It was returned to us not paid.

Q. By whom?

A. Through the First in Cincinnati.

Q. Where is that draft?

A. I suppose it is in our files at home. I haven't it with me. It is possibly destroyed, I don't know.

Mr. Peck: We object to the substance of it and move to strike it out.

Q. Will you look that up and see whether you have it in your files?

A. I will see if I can find it.

Counsel for defendant moves the testimony concerning the draft stricken out.

The Court: I think to save the question it may go out at this time, until it first has been made competent.

Mr. Cash: Note an exception. I will put it in later.

Q. Mr. Earnshaw, I will ask you to state to the jury whether or not you saw any of the reports or copies of them made to the Comptroller of the Currency during 1911 by the Second National Bank, 11 and '12, and where did you see them?

Counsel for defendant objected, objection overruled, to which ruling counsel for defendant excepted.

A. Yes.

Q. Where did you get these reports from?

A. They were mailed to us from the Second National Bank, and they were also in the daily papers.

Q. How frequently were they mailed to you by the Second National Bank, or did you receive them from the Second National Bank?

A. Whenever there was a call for reports they were mailed to us.

Q. How often was that during 1911?

A. I couldn't say that, usually about five calls during the year, four or five times.

47 Q. Where else did you see their financial report?

A. In the daily papers, either the Enquirer or the Time Star, I don't remember which paper.

Q. When with reference to its appearing in the paper did you receive them from the bank?

Mr. Peck: Which one?

Q. Any or all of them would it be before or after.

A. Which, that we received from the bank?

A. Yes.

A. Usually after they appeared in the paper.

Q. Can you state to the jury, Court and jury, whether or not, the reports that you received from the Second National Bank were the same as those published in the paper?

A. Only from memory.

Q. From your memory?

A. Yes, they were the same.

Q. The reports that you received from the Second National Bank, were they printed, typewritten, or what form?

A. Printed form.

Q. Printed form and filled out as to figures?

Counsel for defendant objects, objection sustained.

Q. What else except the printed form, besides the printed form, did they contain?

A. The printed statement inside, the name of the bank, outside, the officers—

Q. Did you have any other information as to the financial condition of the Second National Bank any time other than what

48 you derived from these reports that you got from them?

A. No.

Q. Nor the newspaper?

A. No.

Q. When you received notices from the Second National Bank in December 1911, and January 1912, that they had taken certain shares of the Second National Bank as collateral for two separate loans, did you have any other information about the financial condition of the Second National Bank except as you have stated?

A. No.

Q. When these reports were made to you in December of 1911 and January of 1912 that the Second National Bank had taken those loans with that collateral, did you accept the loans as made?

A. Yes, sir.

Q. What, if anything, did you rely upon in approving those loans as to the value of the security??

Counsel for defendant objected.

At this point the Court took a recess until this afternoon at two o'clock P. M.

Afternoon Session.

MARCH 24, 1915—two o'clock.

The witness, F. W. EARNSHAW resumed the witness stand and his Direct Examination continued as follows:

By Mr. Cash:

Q. Coming back, Mr. Earnshaw, to the reports which you say you received from the Second National Bank as to their financial condition, have you any of those reports left, or have you any of them anywhere?

A. Not that I know of.

Q. I will ask you whether you looked to see if you had any of them before you came down?

A. No.

Q. Do you preserve those reports?

A. No.

Q. You do not?

A. No.

Q. That is, either the files of the newspapers in which they were published or the reports that came directly to you from the Second National Bank?

A. Neither.

Q. You have none of those?

A. No.

Q. Do you remember when you received the last one from the Second National Bank?

A. No.

Q. What year it was in?

A. No, I couldn't say.

Q. Were any reports made of which you received a copy in 1912, do you recall from memory?

A. No, I couldn't say. I think there were, but I couldn't be positive.

Q. Whatever reports you have received, you have not preserved them?

A. None of them.

Q. I will ask you, Mr. Earnshaw, whether you can state from memory what those reports contained as to the Capital stock of the Second National Bank?

A. It showed a \$1,000,000 capital.

Q. Was there any difference in any of those reports that you received in 1911 or 1912 as to that item?

A. No.

Q. I will ask you whether you remember what those statements contained as to the surplus account?

A. Showed the same, \$1,000,000.

Q. I will ask whether any of those statements you received were different from any others in that respect

A. No.

Q. Now, I will ask you whether you have any memory as to what

their undivided profit account was, or if they had an undivided profit account on those statements?

Mr. Peck: When?

Q. 1911 or 1912?

A. No, I couldn't say. I know they had an undivided profit account but I couldn't be positive as to the amount.

Q. Well, approximately what was the amount?

Mr. Peck: I object to that unless the witness knows, and also object because this is not confined to any particular report.

The Court: This is asked as to all reports received?

Mr. Cash: Yes.

Mr. Peck: Of course, that figure would vary necessarily.

51 Mr. Cash: I just asked approximately.

The Court: Ask the preliminary question so as to confine yourself to this only, if he has any recollection.

Q. Do you have any recollection at all, Mr. Earnshaw, as to whether or not these various reports that you received during 1911 or 1912, contained any undivided profits account?

A. Yes, I know they contained something in the undivided profits. As to the amount, I couldn't say.

Q. Approximately, now, if you can tell us. I don't care about the exact amount, that might vary from time to time.

Counsel for defendant objected.

The Court: Does your recollection differ as between different reports?

A. As to the undivided, I couldn't say. On the other, I know that that is what it was on all of them.

Q. Do you mean to say that you can not tell us as to the exact amount?

A. No.

Q. Can you approximate it?

A. No.

Q. I understood you to say that the only two things that you saw showing these financial statements were what were sent to you direct and what appeared in the Enquirer?

A. Yes.

Q. And I think you said it appeared in the Enquirer some time after?

Counsel for the defendant objected.

Q. When did it appear in the Enquirer to your best recollection?

52 A. About the same time that we received the reports by mail.

Q. Have you any recollection of noticing any difference between the reports that you received from the Second National Bank direct and the reports that you read in the Cincinnati Enquirer?

A. No.

Q. Now, to bring the matter again before the Court—I do think the Court ruled on it—I will ask you whether or not wh

you received notice from the Second National Bank of the financial statement of the Second National Bank and saw these reports in the Enquirer which you say were the same, whether or not in your estimate the value of that Second National Bank stock, you relied upon those two sources of information alone?

Counsel for defendant objected.

The Court: As to form or substance?

Mr. Peck: As to substance.

The Court: There is no objection, I understand, as to the form of the question, but as to whether it is leading or not?

Mr. Peck: No, we don't press this objection as to form.

The Court: I will overrule the objection as to substance.

Counsel for defendant excepted to the ruling of the Court.

A. Yes.

Q. I will ask you, Mr. Earnshaw, as a banker what would be the value of that stock based upon those reports?

53 A. Something over \$200, per share.

Q. I think I asked you whether or not you knew at the time this I. Doyle loan was made, who I. Doyle was, and if I haven't you will kindly answer it?

A. I did not.

Q. You did not know who the person who——

A. No.

Q. I will ask you now, Mr. Earnshaw, in making these loans whether or not you relied on the maker of the notes?

A. No.

Counsel for defendant objected.

Q. As to the responsibility of the maker, I will put it.

Counsel for defendant objected, and the objection was sustained to which ruling — the Court Counsel for Plaintiff objected and avowed that if the witness were permitted to answer, he would state that he did not rely upon the note or the responsibility of the maker, but upon the collateral of the loan.

Q. Now, Mr. Earnshaw, I will ask you whether or not you had any conversation with Mr. Galbreath about either one or both of these notes at any time subsequent to the time they were sent to you?

A. No.

Q. I mean at the Bank, did you meet him at the Bank, Mr. Galbreath?

A. You mean at the time these loans were taken?

Q. After you made demand on them did you have any talk with him?

54 A. After I made demand, after I received the loans from the bank, the notes from the bank?

Q. Well, later on than that?

A. Yes, I spoke to Mr. Galbreath.

Q. When was that and where?

A. That was at the bank the same day that we couldn't fix the

date, the day in April that I came down after the note. Mr. Galbreath was just leaving, and I asked him about that and he said, "I am in a very big hurry. I can't say anything to you to-day," something of that kind.

Q. Did you see him subsequent to that, after that?

A. Yes.

Q. When and where?

A. At the time, I can't say, it was at an office in Second National Bank Building. He had an office there, and Mr. Wagner and myself, our president, called on him and asked him in regard to the—

Counsel for defendant objected unless the time is fixed.

Q. How long was that after the first conversation that you had with him at the bank?

A. I couldn't say.

Q. Can you give us approximately?

A. I can find out.

Q. Your best recollection about the time, that is what I want to get at.

Judge Jelke: Was it after the 15th of April?

55

A. After the 15th of April, yes.

Judge Jelke: He was in an office of the bank then.

Q. You say you saw him at that time in the Second National Bank Building, he had an office there?

A. Not at the bank, in his office upstairs, somewhere.

Q. And Mr. Wagner was with you?

A. Yes.

Q. What conversation did you have with Mr. Galbreath then about these notes?

Counsel for defendant objected upon the ground that Mr. Galbreath was not then an officer of the bank.

The Court: Is this fact admitted, that Mr. Galbreath was not then an officer?

Mr. Peck: I think it must be admitted, I don't think there can be any question about it.

Mr. Cash: That is all right, if it is so, we don't have any objection to that. The point is, if your Honor please, we claim it is admissible to show Mr. Galbreath's responsibility, if there was any at the time.

The Court: Well, he was not then representing the Bank, if I understand you, Mr. Earnshaw?

A. No, he was not representing the bank.

Mr. Cash: Of course, to show he was insolvent, that he had nothing to pay it with.

The Court: How does this become pertinent in this case?

Mr. Cash: That is to prove the allegations of our reply, that he was, we want to prove it, that is all.

56

The Court: I think that matter should be proved independently. I will sustain the objection.

To which ruling of the Court counsel for plaintiff excepted and avowed that if the witness were permitted to answer, he would state that at that time Mr. Galbreath had said to the witness that he did not care anything about the notes, that he was insolvent.

Mr. Cash: There are some matters that I will have to recall the witness because of loss and destruction of those papers. I want to offer these two reports of the Second National Bank (indicating).

Counsel for defendant objected, and the Court sustained his objection for the present.

57 Cross-examination.

By Mr. Peck:

Q. Mr. Earnshaw, when did you first become acquainted with Mr. Galbreath?

A. I met him one time about a year or so previous to our opening an account, but I don't know that I was acquainted with him, simply met him, that was all.

Q. That was just a social meeting, acquaintance?

A. I met him at the bank. I was in there one day and was introduced to him.

Q. He was then what official of the bank when you first met him?

A. I think he was vice-president.

Q. He was behind the desk at the bank at that time, was he?

A. He was an officer there, yes. I think he was vice-president.

Q. Well, you knew he was an officer of the bank?

A. I knew he was an officer of the bank, yes.

Q. From that time until the day when you met him out at his house and made this arrangement with him personally, from the first up to the second, did you have any acquaintance with him?

A. Not that I can remember of. I don't know that I ever met him.

Q. Had you ever seen him between those two times?

A. Not that I remember of.

Q. How did you happen to go to his house, Mr. Earnshaw?

A. I was only down here Sunday, and I am the only one out there you understand, and I went on Sunday to his house.

Q. Did you seek him?

A. Yes.

58 Q. Did you have an engagement with him or call him up and make an engagement with him,—you hadn't heard from him before that?

A. Not that I remember of, but possibly a letter from the bank but not him direct that I remember of.

Q. Were you doing any business with the bank before that time?

A. No, sir.

Q. Now, you went out there to his house. You wanted to change your account from the First National Bank to the Second National Bank, as I understand you to say?

A. We wanted simply to change part of it. We simply wanted

to open an account with them. We still carry an account with the First.

Q. Your reason was, you stated this morning, because the First did not make call loans?

A. Yes.

Q. You wanted to get this balance in some bank that would make call loans?

A. They would make call loans, but claimed they couldn't get them at that time, to accommodate us.

Q. So you wanted to get it up to the Second National Bank?

A. Part of it, yes.

Q. Well, they were not making call loans for you at that time down at the First, were they?

A. Yes, they were making call loans for us.

Q. At that time?

A. You mean right at that day or not?

Q. No, about that time.

59 A. Yes, they were making they claimed as fast as they could get them. They couldn't get the amount we wanted.

Q. Was that when you would write them in for that or how?

A. Oh, yes, we would always write for them.

A. Now, what was your engagement with Mr. Galbreath about the making of call loans?

A. You mean the conversation?

Q. Yes, what was that?

A. Why, we told him we would like to open an account with him, and we would want call loans.

Q. No, what I want to know is this, was he to make these call loans from time to time on specific instructions from you, or was he to act only upon your instructions?

A. Only upon our instructions, just as we would ask for them.

Q. Just as you would ask for them?

A. Yes.

Q. This you designated as your legal reserve bank here, didn't you.

A. As one of them, yes.

Q. To hold your legal reserve?

A. Yes.

Q. You knew that the law required you to keep a certain legal reserve in a bank?

A. Yes.

Q. Or in your vault?

A. The reason we didn't really ask for that. They all have those blanks. We could simply do that if we cared to. We didn't get that for that purpose.

60 Q. You did designate it as a legal reserve bank?

A. Yes.

Q. You couldn't give anybody else control of your legal reserve, could you? You had to keep that under your own direction didn't you?

A. That wasn't our only legal reserve. We could use that—

Q. I would like to have you first answer my question.

A. Well, I don't know that you could say that our legal reserve—we might have had enough without that.

Q. If it was a part of your legal reserve you knew that you couldn't give anybody else the handling of it ad libitem, as they chose?

A. Oh, we have to keep a certain amount, but that does not say where, in which bank we have to keep it. That might never have been our legal reserve. We may have had enough without that.

Q. But you can't go around in different banks and let them lend it out as they choose, because they might have it all lent out, and then you would have no legal reserve?

A. We had enough balance in our different banks to make our legal reserve.

Q. That was the reason you have to keep account of your legal reserve, and they make loans only upon your request?

A. It is only upon our request.

Q. They didn't just take your balance and lend it out without asking you, did they?

A. No.

Q. You never made any such arrangement as that, did you?

A. No.

Q. But it was only when you would request it they would see if they could find call loans for you?

A. Yes.

Q. You didn't pay them anything for this, did you?

A. No, nothing direct.

Q. You know that some banks make a charge for this, do you not?

A. Not that I know of.

Q. You don't know that?

A. No, sir.

Q. Didn't you know that some national banks in Cincinnati make a charge for performing this service?

A. I didn't know it.

Q. Of course, your ordinary account there drew two and a half per cent, your average daily balance in the Second National Bank?

A. Yes, sir.

Q. You preferred to get it out on call loans to get more interest than that?

A. Yes.

Q. That was the idea, wasn't it?

A. Yes.

Q. This thing of making these call loans by Mr. Galbreath was a matter of accommodation for you, wasn't it?

A. Well, they were made by the bank and not by Mr. Galbreath.

Q. Well, whoever made them, it was a matter of accommodation for you, wasn't it?

A. Yes.

Q. You saw this letter from Mr. Galbreath of January 1,

1911, when it came in in which he said, "I am pleased to let you know that I have been elected president of the bank," or words to that effect?

A. Yes.

Q. And it then came to your attention that Mr. Galbreath was president of the bank, didn't it?

A. Yes.

Q. And it was from and after that time you wrote to Mr. Galbreath as president and received letters from him as president, didn't you?

A. I may have a few letters, yes.

Q. You knew he was president of the bank.

A. I knew he was president of the bank.

Q. You were aware that E. E. Galbreath was the president of the Second National Bank?

A. Yes.

Q. And when the slip came along in December of 1911, the loan of \$2,500 to E. E. Galbreath, you knew that that was a loan to Mr. Galbreath who was president of the Second National Bank?

A. Yes.

Q. By the way, when you reported to the Comptroller of the Treasury of the United States, did you report these loans?

A. Yes.

Q. That you had made by these banks here?

A. Yes.

Q. Did you report them as part of your reserve?

63

A. Oh, no, we reported them as loans.

Q. You don't mean to say that there is any well-defined custom of the city banks taking the country banks' money to lend out whatever they happen to have there without request, without special request, do you?

A. Request of the country banks?

Q. Yes.

A. No, we request them to do that.

Q. It is only when it is requested?

A. That they do it.

Q. That they do it?

A. Yes, they wouldn't touch us then if we didn't.

Q. They do it as an accommodation for the country bank?

A. Yes, I suppose an accommodation. That is an inducement they offer to get us to do business with them.

Q. Do almost any other little favor you happen to request of them from the country, won't they?

A. Yes.

Q. Run out and get theater tickets for you?

A. They never did for me. I guess I am not wise to that.

Q. That is one thing you didn't know about?

A. I didn't know about it.

Q. Now, this loan, when you got this slip which is marked E #6, loan to E. E. Galbreath, \$2,500, with eleven shares of Second

National Bank stock as security, you entered that loan in your book in the name of E. E. Galbreath, didn't you?

A. Yes.

Q. What date did you make that entry in your book?

64 You have got your discount book?

A. As December 9th, it shows on here.

Q. That was the date—

A. That is the same date as the paper. It would go on our blotter possibly a day or so later than that.

Q. That is the date when you made the first entry in your own book?

A. On this register, yes.

Q. Just read that entry there, will you please, that you made on that date?

A. Well, this is only a record of the loan. (reading) "E. E. Galbreath, 11 shares of the Second National Bank stock."

Q. Just read the headings of those columns?

A. This is "Maker, drawer: E. E. Galbreath, Secretary, 11 shares of Second National Bank stock. Where payable, the Second National Bank in Cincinnati. Date of paper, December 9, 1911. Time, on demand. Amount, \$2,500.00."

Q. Now, you carried that loan along without taking any action in regard to it. Did you receive any memorandum of interest credited to you at the Second National Bank on account of that loan?

A. The last one is February 1st, I believe. We have the memorandum here somewhere.

Q. After that, did you receive any memorandum of interest?

A. Nothing after that. The interest was to be paid every three months on that.

Q. So that on February 1st you got a memorandum from
65 the Second National Bank that they had given you credit for the amount of interest on that loan?

A. Yes.

Q. How much was that?

A. We would have to refer to this memorandum here.

Q. Well, refer to it in order to answer my question.

A. Here is the sheet here. \$18.75.

Q. You got a memorandum from the Second National Bank dated February 1, 1912, in which you were advised that on the loan, among others, of E. E. Galbreath for \$2,500, that you had been credited the sum of of \$18.75, interest on that?

A. Yes, sir.

Q. And I suppose you made a contra charge against the Second National Bank on your books for \$18.75?

A. Yes, sir.

Q. The other one of November 1st, that was before the Galbreath loan was made?

A. Yes.

Q. Now, after that nothing was done concerning the Galbreath loan. By the way, what rate of interest did this Galbreath loan bear?

A. Well, at that time on the list it was 5%. They would vary, you know.

Q. That would vary, would it?

A. Yes. The call loan rate varies, you know, that would vary with the market.

Q. On March 19, 1912, you wrote Mr. J. G. Gutting, Second
66 National Bank, Cincinnati. "Dear Sir: Yours of the 18th inst. has been received. In regard to the loans referred to, if you can not get me a better rate on time loans than on call loans, we would not care to change our call loans to time loans. Yours truly, F. W. Earnshaw, Cashier."

A. Yes.

Q. He was offering to change these loans to time loans for you at that time, wasn't he?

A. No, we asked him to make the change.

Q. Then at this time you wrote him to the effect that you were satisfied to have them remain call loans?

A. He told me he couldn't get the better rate on time loans, so we would prefer to have them on call loans than on time at the same rate.

Q. It was your habit each month to receive from the Second National Bank a statement from them showing the balance of your account with them, wasn't it?

A. Yes.

Q. And if that balance was correct as you conceived it to be, why you so notified them, didn't you?

A. Yes.

Q. You got these reconcilements, didn't you, between the two banks, is that the name used?

A. The large sheets, yes.

Q. You received an account current each month from them, didn't you?

A. Yes.

Q. Showing those transactions?

67 A. Yes.

Q. On or about the first of January you received a sheet from the Second National Bank addressed to the First National Bank of Okeana showing among other items a call loan of E. E. Galbreath for \$2,500, did you not?

A. Yes.

Q. Of course, you were aware, when you got that, that Mr. Galbreath was president of this bank down here?

A. Yes.

Q. Now, from month to month you received small sheets known as "reconcilements" from the Second National Bank, did you not?

A. Yes.

Q. They would all be headed: "Reconcilements should be signed by an official of the bank."

A. Yes, sir.

Q. They would show the balance that you had on deposit left after your checks that you might draw on them had been paid, and

after what loans they had made for you had been taken out of your money, they then would report to you how much money you had left in the bank, wouldn't they?

A. Yes.

Q. That would not include the loans that they had made for you after taking this out, would it?

A. Yes, sir.

Q. For instance, January 8, 1912, they reported that you had \$1311.65. That correct?

A. Yes.

Q. And you signed it, you sent this to them: "To the Second National Bank: Your account current to December 31, 1911, showing a balance of \$13.65 due us agrees with our books with the exceptions noted below. Yours respectfully, F. W. Earnshaw, Cashier." Now, there were no exceptions, you took no exceptions, did you?

A. No.

Q. Likewise upon February 2nd you received from them for your signature a statement showing that your balance with them on January 31 was \$2,619.95, did you not?

A. Yes.

Q. And you signed that, that it agreed with your books? Is that correct?

A. I suppose it is. I don't know the amounts, but I judge that is right.

Q. That is your signature, is it not?

A. Yes, I judge that is my signature.

Q. Don't you know that it is your signature, Mr. Earnshaw?

A. Yes, I think it is. I would say it was.

Q. Let us not have any question about whether it is your signature?

A. I would say it is my signature, yes.

Q. You took no exceptions to that?

A. No.

Q. Then on March 1st they sent you reconciliation showing that you had a balance of \$4,107.95 which you signed as agreeing with your books, and took no exceptions?

A. Yes.

Q. On April 2nd, 1912, they showed your balance was \$4,339.56, which you likewise signed and took no exceptions to?

A. Yes.

Q. Of course, if the Galbreath loan had not been made your account would have been \$2,500 bigger, wouldn't it?

A. Yes.

Q. If that money had not been taken out?

A. Yes.

Q. Now, on the 18th day of April they transmitted to you an account showing that on April 13th your balance was \$25.12, and you signed that as agreeing with your books "with exceptions noted

below. Yours respectfully, F. W. Earnshaw, Cashier," and took no exception, did you not?

A. No, it agreed with our books.

Q. And upon May 1st, in 1912, they reported to you that your balance was \$26.48, and you signed that, didn't you?

A. Yes.

Q. And on June 4th they again notified you your balance was \$26.48?

A. Yes.

Q. As of May 31st?

A. Yes.

Q. And you signed that, and took no exceptions?

A. Yes.

Q. And upon July 5th they notified you that upon June 29th you still had the same \$26.48 in their bank, and you signed that as correct and took no exception?

A. Yes.

Q. So that up until the first of June at least you took no
70 exception to the state of your account as shown by the books of the Second National Bank, as shown there, did you?

A. That simply states that our balance on our books shows the same as they have sent us, which was true, our books showed the same thing.

Q. Now, upon or about April 13th you say that you saw in the Enquirer that the Clearing House Association had taken charge of the Second National Bank?

A. Yes.

Q. That is that the Directors of the Second National Bank had resigned and the presidents of the other banks in Cincinnati had been elected directors of that bank, was that not it?

A. Yes.

Q. And that Mr. Galbreath had resigned as president and Mr. Laws had been elected president in his place, isn't that so?

A. I judge that is right. I don't remember all the details in regard to it.

Q. And that the Clearing House Association had guaranteed the depositors of the Second National Bank?

A. Yes.

Q. The Clearing House Association of Cincinnati?

A. Yes.

Q. And you knew then that the bank was in trouble, didn't you?

A. Yes.

Q. You knew that it was in trouble then. You saw then that the capital of the Second National Bank had become impaired, didn't you?

A. Yes.

71 Q. You were aware of that, then?

A. Yes.

Q. On the 13th day of April?

A. I judge that was the day, sometime about the middle of April, yes.

Q. On Monday you came down to Cincinnati?

A. Yes.

Q. I suppose you came because you seen it in the Sunday newspaper?

A. I saw it in the Monday newspaper. I didn't see it Sunday.

Q. Are you sure of that, Mr. Earnshaw? Isn't your memory playing a little trick on you, didn't you see it in the Sunday paper and come down on Monday?

A. No, I saw it in the Monday paper and came right away as soon as I saw it.

Q. Had you seen it in the Sunday paper?

A. I didn't get the Sunday paper.

Q. Then you saw this in the Monday newspaper?

A. Yes.

Q. You came to the city, to the Second National Bank?

A. Yes.

Q. And you then asked to see these notes and collateral, didn't you?

A. Yes.

Q. Who did you speak to at the bank?

A. Mr. Cutting, if I remember correctly, in regard to taking the loans away?

Q. Yes.

A. I think it was Mr. Cutting. I spoke to several in there at that day.

Q. And he then and there produced Mr. Galbreath's note for \$2,500 with how many shares attached, was it ten or twelve?

A. Eleven.

Q. Eleven shares of the Second National Bank stock attached to as collateral, did he not?

A. Yes, he did.

Q. Did you look at it?

A. Yes.

Q. Of course, you looked at the collateral?

A. Yes.

Q. And saw that it was properly endorsed, the stock, you saw that the stock was properly endorsed, did you not?

A. Yes.

Q. You would not have taken it if it hadn't been properly endorsed, would you?

A. No.

Q. What did you do with it?

A. Took it home with me.

Q. You put it in your pocket?

A. Yes.

Q. He also got out for you a note signed by I. Doyle?

A. Yes.

Q. And that had some ten or twelve shares attached, didn't it?

A. Twelve.

- Q. And that note, I suppose you looked at that collateral attached to it?
- 73 A. Yes, and the collateral was Galbreath's stock.
- Q. And the collateral was Mr. Galbreath's stock, wasn't it?
- A. Yes.
- Q. That was collateral to that?
- A. Yes.
- Q. That was the same Mr. E. E. Galbreath who up to that time had been president of the bank, wasn't it?
- A. The same.
- Q. You knew that was the same man, didn't you, at that time?
- A. He was the only one I knew of.
- Q. Well, there was no doubt in your mind, was there, who it was?
- A. No, I suppose he was the man.
- Q. You likewise put that in your pocket after examination, didn't you?
- A. Yes.
- Q. And you took it over to the bank at Okeana?
- A. Yes.
- Q. Where did you put it there?
- A. In our safe.
- Q. How long did you keep it in your safe?
- A. Could you tell me the date I came to see you?
- Q. Well, now, you will have to answer to the best of your recollection.
- A. I had a record of it. I couldn't state as to the exact time.
- Q. Where is your record?
- A. I haven't it with me. I have it at home. I have Mr. Cash's receipt for the notes when I turned them over to him.
- 74 Q. Well, now, it was on or about the 22nd of July that you turned these over to Mr. Cash, wasn't it?
- A. No, I think not. I think it was sometime in May. I would have to look at the receipt to see.
- Q. You don't know, at any rate, what time you turned them over to your lawyer?
- A. I can tell by looking at my receipt. I haven't it with me. I couldn't say the exact date, no.
- Q. And Mr. Cash had them, you don't know how long they remained in his possession?
- A. I don't know anything about that. I haven't seen them since that time.
- Q. Or what afterwards became of them?
- A. No.
- Q. Now, you took those notes home about the 12th of April, didn't you, the 13th of April I should say?
- A. Somewhere along there, yes, about the middle of April.
- Q. Couldn't we fix the date of that Monday a little more closely?
- Mr. Moulinier: Here is an Enquirer of Sunday, this is Sunday, April 14th, 1912, so that Monday would be April 15.

Q. Monday would be April 15th. Well, then, I guess we gentlemen can agree about that date.

Mr. Cash: I think that is right. We will agree to it, that is the date.

Mr. Peck: Is is the same date that the receipt for the stock is, as we will show when we come to it, so there can be no question about that being the date.

75 Q. Now, you said I believe that you returned to the bank about two days after this? And had a further talk with Mr.—what was the man's name—Telker, is that correct, Mr. Earnshaw?

A. Yes, a short time after that. It was the same week, I think.

Q. Within the same week?

A. Yes, just a short time after.

Q. You wouldn't know what day in the week that would be?

A. No.

Q. You were, of course, aware when you went back to Okeana that the securities, that the Galbreath stock was pinned to the Doyle note, was collateral for the Doyle note?

A. Yes.

Q. When you came back Mr. Telker was one of the officials in the bank?

A. He was assistant cashier.

Q. He told you that the Doyle note was in fact Galbreath's loan, didn't he?

A. He told me that the first time I was there.

Q. He told you that the first time?

A. The first time.

Q. That would be on the 15th?

A. On the 15th.

Q. So that when you went back, when you went out of the bank on the 15th of April with the Galbreath note and the Doyle note and the two Galbreath certificates of stock you were aware that it was all of it in fact Galbreath paper, weren't you?

A. Why, I had to take Telker's word, that was all.

Q. You were advised——

76 A. I judge it was his.

Q. You also saw that the Galbreath stock was collateral of the Doyle note?

A. Yes.

Q. You had requested of the Second National Bank prior to their taking the Doyle loan and also prior to their taking the Galbreath loan, that they procure collateral loans for you, not these particular loans but that you had requested of them I mean to get loans for you?

A. Yes.

Q. In this amount or a greater amount?

A. Well, if we had a surplus, we would ask for a certain amount. They knew they could not take over \$2,500 for us.

Q. What I mean is they did not take these loans without your

having asked them to get collateral loans for you. You asked them to get collateral loans for you?

A. I would ask them to get collateral loans for us.

Q. Now, you spoke of a letter which you were at first of the impression you had written by hand and afterwards were of the impression that you had written on a typewriter?

A. Yes.

Q. That you addressed same in April to the Second National. That was prior to the date of your visit to the Second National Bank, was it not?

A. Yes.

Q. In that letter you asked the Second National Bank to call those loans?

A. Yes.

77 Q. That is you requested them——

A. To have the loans paid.

Q. You requested them to call upon the makers of the loans to pay the loans?

A. Yes.

Q. That would be, of course, you requested that as a favor to you?

A. Yes.

Q. For your accommodation?

A. For us, yes.

Q. Do you know how long that was before the 15th, before the day you came to Cincinnati?

A. Just a very short time, just possibly a day or so. The latter part of the previous week I think was when I wrote in.

Q. Did that letter specify that you wanted the Doyle and the Galbreath loans called or all your loans?

A. Just those two.

Q. Did they have other loans outstanding for you at that time?

A. Yes.

Q. Why did you pick out the Doyle and the Galbreath loans at that time as those which you desired to have called?

A. The bank examiner had been with us that week and had advised me to do so, and said he was not calling on the Second National Bank stock for anything like \$200, and advised us to do something about it, which I did.

Q. The bank examiner at that time had advised you that the security was not—the Second National Bank stock was not adequate security for loans of that size?

78 A. That is the way he expressed it. He said he wouldn't lend on Second National Bank stock for anything like \$200 a share.

Q. That was sometime the previous week, was it?

A. Just a short time before I wrote in, yes, possibly a day or so.

Q. Then you wrote in and asked them to please make demand on the makers?

A. Yes.

Q. To get that money for you?

A. Yes.

Mr. Peck: I would like to have these reconcilements to which I have referred marked for identification.

Mr. Cash: You can put them in, if you wish.

Mr. Peck: Oh, well, we will offer them in evidence, if it is agreeable to you.

Mr. Cash: That is agreeable.

The said papers were admitted in evidence, and are attached hereto as part hereof, marked Ex. A, Ex. B, Ex. C, Ex. D, Ex. E, Ex. F, Ex. G, and Ex. H. respectively.

Q. Mr. Earnshaw, to resume, you stated that you drew a draft on the Second National Bank which you haven't here?

A. Yes.

Q. Do you remember when that draft was drawn?

A. It would be somewhere near the 12th of April.

Q. That was just about the same time that you wrote in the letter, wasn't it?

A. The same day I believe.

Q. That was rather an unusual thing to draw a sight draft on your correspondent bank, wasn't it?

A. We wished to transfer it first, and get it again.

Q. You wanted to get out as quick as you could?

A. Sure.

Q. You were alarmed, weren't you, at that time?

A. Why, I felt a little uneasy, yes.

Q. And that is the reason you drew this sight draft, wasn't it?

A. Yes.

Q. If you had thought things were all right you would not have taken that step, would you?

A. No, if we thought the stock was good and we hadn't received that information, and if it hadn't been a loan on it we would not have called it.

Q. The draft you drew in favor of the First National Bank, did you?

A. Yes, either in favor of ourselves and endorsed to them or direct to them I don't know.

Q. At any rate you made this draft so that the money would be in the First National Bank of Cincinnati?

A. Yes, sir.

Q. You also were carrying an account down at the First at that time?

A. Yes, sir.

Q. When you were here on the 15th day of April did you consult with anybody else about the condition of the Second National Bank?

A. When I was down on the 15th?

Q. Yes, that Monday when you came down and saw the article in the Enquirer?

A. Yes, I was down to the First afterwards.

Q. You talked to Mr. Rowe, did you?

A. No, Mr. Rowe, I didn't, Mr. McEvily.

Q. About the conditions up at the Second?

A. Yes, I showed him what I had and he says——

Q. I didn't ask you what he said. I asked you the general subject of the conversation.

A. Wouldn't you like to know what he said?

Q. No, I am not asking you that. If you want to bring it to your attorney here will ask you. Now, was that about condition that you spoke of at the Second National Bank?

A. I simply showed him what I had, and that is about all the was to it.

Q. That is, the notes and the collateral?

A. The notes and the collateral?

Q. You showed those to him?

A. Yes.

Q. Did you talk to any of the other bankers in the city, any those who had become directors?

A. Of the Second?

Q. Of the Second.

A. No, Mr. Davis was not a director. No, I didn't speak to any one that was a director.

Q. You know that the various national bank presidents of the city had permitted themselves to be elected directors of the Second National Bank?

A. Yes.

81 Q. Because there was a crisis in its affairs?

A. I didn't talk to any of those.

Q. You knew that, what had happened?

A. Yes. I received notice from the Clearing House.

Q. That was in the paper, wasn't it?

A. Yes, sir.

Q. That that action was taken. When you saw the Enquirer report, or the report in the newspaper of the conditions—I don't mean this article on the 15th of April, but I mean their published statement in the paper, the bank statement?

A. Yes.

Q. What paper was that in, Mr. Earnshaw?

A. The Enquirer.

Q. What was the date of that report that you saw?

A. I couldn't remember that.

Q. About when, if you remember?

A. I couldn't tell you that at all.

Q. You can't state when it was?

A. No, I simply know that I noticed them in the paper as they came out, whenever the call was, I would look them over in the paper then with the other bank statements, and they always mailed their statement with the other banks of the city. That is the custom to mail them to their correspondents.

Q. So far as remembering it when any particular one appeared you are unable to state that?

A. I couldn't state. Of course, I could look it up and tell you that, but that wouldn't be remembering it. I couldn't say.

82 Q. What I want to get in is the state of your recollection. If I get it right it is this: that when the bank statements were called for by the Comptroller of the Currency they usually appeared in the newspapers?

A. Yes.

Q. And you generally looked them over in the newspapers?

A. Yes.

Q. All the bank statements?

A. Yes.

Q. As a banker you would look them over?

A. Yes.

Q. You don't undertake to say that you saw every individual one, do you?

A. No.

Q. You don't undertake to say that some may not have escaped your attention?

A. Oh, no, no.

Q. So far as recollecting or stating the date or any particular statement, you are unable to do it?

A. Unable to do it.

Q. Do you remember that statement that they carry, I believe you said it was, a million dollars capital and a million dollars surplus?

A. Yes, sir.

Q. You think they had something in the column "Undivided profits, but of that you are not—

A. I couldn't say what the probable amount is. All their stationery which they mailed to me showed the same thing.

83 Q. So far as these statements are concerned, that correctly states the condition of your memory?

A. Yes.

Q. Do you know whether you got any statement in the year 1912? I want your recollection, not your inference, but the recollection you have got in your mind, can you recollect?

A. No, I couldn't recollect that I did. Possibly I may have one at home. I could look and see.

Q. But you don't remember?

A. I can't remember that I did.

Q. Now, did you follow the market price of this stock in the newspapers, this Second National Bank stock?

Counsel for plaintiff objected; objection overruled, to which counsel for plaintiff excepted.

Q. Did you follow in the newspapers the quotations of the stock of the Second National Bank?

Counsel for plaintiff objected; objection overruled, to which counsel for plaintiff excepted.

A. I may have looked at it from time to time. I usually look over to see what the different stocks are quoted at.

Q. You knew that you had some out on collateral?

A. No doubt I looked at the paper to see what it was quoted at.

Q. Well, don't you remember having done that?

A. Yes, I remember looking at the paper along that line on all the stocks. I no doubt looked up the Second.

Q. You were aware that the Second National Bank stock was actually selling in the Cincinnati market during the months of January and February, 1912, in excess of \$200 a share, weren't you?

Counsel for plaintiff objected; objection overruled, to which counsel for plaintiff excepted.

Q. Did you not, Mr. Earnshaw?

A. No, I hadn't seen any sales of it.

Q. You didn't see the money passed?

A. In the paper I hadn't noticed any sales; I saw where they were held at I believe about 250, something of the kind, but after this occurred there was a notation in the paper that no sales had been made since May, several months previous to that.

Q. I am talking about the quotations during January and February?

A. I did not. I didn't notice any sales in the paper at all.

Q. Did you notice offerings for the stock during that time? It is usually quoted as a price which is asked and a price which is offered for the stock?

Counsel for plaintiff objected; objection overruled, to which counsel for plaintiff excepted.

Q. Do you remember that?

A. I don't remember any offering. I don't remember what it was.

Q. On the Doyle loan you also received interest, did you not?

A. Yes.

Q. Can you give us the date when you received and credited interest on that loan?

A. That was the same day, February 1st, wasn't it? February 1st.

Q. How much interest did you receive on that?

A. \$9.38.

Q. Now, you subsequently withdrew from the Second National Bank your balance except as you claim the controversy on these two loans, did you not?

A. Yes.

Q. That is over and above the amount involved in the controversy about these two loans, you don't claim to have anything coming from the Second National Bank, do you?

A. No.

Redirect examination.

By Mr. Cash:

Q. Mr. Earnshaw, Mr. Peck has asked you whether you had any thing coming from the bank except these amounts of these two loans. None of that has been repaid to your bank by the Second National Bank, has it?

A. The amount of these two loans?

Q. Yes.

A. No.

Q. How much is there due, according to your estimate?

A. Five thousand dollars.

Counsel for defendant objected.

Q. What is the amount due you, I mean due on the notes, that is understood.

The Court: I think he has answered the loans haven't been paid.

Q. Mr. Peck has asked you about Mr. McEvily, that is Mr. McEvily of the First National Bank?

A. He is the cashier there now.

Q. Was he at that time?

A. I think he was an assistant cashier at that time.

Q. What did he say to you when you showed him these Second National Bank stock?

Counsel for defendant objected.

Q. You don't mind telling us what he said, do you, Mr. Earnshaw?

Counsel for defendant objected, and the objection was sustained.

A. I will tell it—

Counsel for defendant objected, and the objection was sustained, to which ruling of the Court Counsel for Plaintiff excepted and avowed that, if the witness were permitted to answer, he would state that Mr. McEvily said: "Well, I'm surprised that you had any of that stock. We haven't had any of it in this bank for over six months. There has been no sales of it for over six months, and we knew the bank was in bad shape."

Q. Mr. Earnshaw, Mr. Peck asked you some questions about the amount of interest that appeared in the statement on February 1st with reference to these two loans of Doyle and Galbreath. They were based on this statement of February 1st, did they not?

A. Yes.

Mr. Cash: I want to offer this statement, Mr. Earnshaw.

The said statement was admitted in evidence and is attached hereto as part hereof and marked Exhibit #33.

Q. I want to ask whether you received a similar statement on the 1st of every month from them?

A. No.

Q. What month, do you remember that you received it?

A. It would be every three months.

Q. The last one was November 1st, 1911, and this is the next one, is it?

A. February 1st, those are every three months.

Q. Have you any of those after February 1st?

A. No.

Q. None after that?

A. No.

Counsel for plaintiff read to the jury the Exhibit #33 just introduced.

Q. I want to ask you, Mr. Earnshaw,—there are eleven names on there of call loans—whether you know any of the people whose names are there among the list of call loans?

A. Now or at that time?

Q. At that time.

A. Mr. Galbreath was the only one. Mr. Gutting, he is on there.

Q. Who is Mr. Gutting?

A. He was the cashier of the bank.

Q. Is he in the room?

A. Yes, sir.

Q. He is now with the Second National Bank, is he?

A. Yes, sir.

Q. What position does he occupy?

A. Cashier.

Q. Did you know at the time these loans were made anything about the financial responsibility of any of those people?

A. No.

Q. Did you make any inquiries as to their financial responsibility?

A. No.

88

Q. Mr. Earnshaw, in answer to a question put to you by

Mr. Peck, you stated that the making of these call loans by city banks, and by the Second National Bank here in particular for country banks, for your bank, the inducement for their doing that was your doing business with them?

Counsel for defendant objected.

Mr. Cash: I want to direct his attention to what I want first.

Q. What did you mean by saying that was the inducement?

Counsel for defendant objected.

The Court: Did you say that in the first place, Mr. Earnshaw?

A. Yes, I may have answered Mr. Peck that way.

Q. What do you mean by that being the inducement?

Counsel for defendant objected; objection overruled, to which ruling counsel for defendant excepted.

A. They offered that as part of having us open an account with them.

Counsel for the defendant moved that the preceding answer be stricken out, on the ground that it is not definite who it refers to.

Q. Let us change it then. Confining your attention to the transaction between the Okeana Bank, the Second National Bank—

The Court: I would like to know the state of the record on this. I will grant the motion. If it relates to this bank it must so appear. If it is a part of the course of dealing it must so appear.

Q. Confining your attention to the transaction between the Okeana Bank and the Second National Bank you said that the Second National Bank agreeing to make call loans for your bank, that that was an inducement for your opening the account with them.

A. That was their only reason——

Counsel for defendant objected.

The Court: It is simply asking him his former testimony.

Q. Strike it all out. In answer to a question of Mr. Peck you said that the making of these call loans for the Second National Bank, that the inducement for that was your opening an account in their bank. I want to know what you meant by that language.

Counsel for defendant objected.

Thereupon the stenographer, at the request of the Court, read from the Cross Examination of the witness the following question and answer: "They do it as an accommodation for the country bank? A. Yes, I suppose an accommodation. That is an inducement they offer to get us to do business with them."

The Court: An explanation of the answer can be given; objection overruled.

Q. You heard the stenographer read the answer you made to Mr. Peck. I wish you would explain what you mean by that, in that answer when you used the word "inducement"?

A. That was a direct reason for opening the account with the Second National Bank because they could get us, said they could get us call loans, and we needed call loans.

Q. State whether or not it is of any value to a city bank to have a country correspondent?

Counsel for defendant objected.

A. Yes.

The Court: I think that must be confined to a course of banking business and not from the witness' individual statement. Objection sustained.

To which ruling of the Court Counsel for Plaintiff excepted and avowed that if the witness were permitted to answer, he would say yes.

Q. Do the city bank- make any money on the country banks, on their accounts?

Counsel for the defendant objected, and the objection was sustained, to which ruling of the Court Counsel for plaintiff excepted. (The witness leaves the stand.)

DENIS F. CASH, being first duly sworn, testified in behalf of the plaintiff as follows:

Direct examination.

By Mr. Moulinier:

Q. What is your name?

A. My name is Denis F. Cash.

Q. You are an attorney for the plaintiff in this case, are you?

A. I am.

Q. Do you remember when you were employed by the bank in the case?

Counsel for defendant objected, objection overruled.

A. I can't say definitely. It was some time prior to the 22nd day of July, 1912.

Q. Do you remember Mr. Earnshaw giving you the stock of the Second National Bank which was put up as collateral with
91 the two notes?

A. I do.

Q. Did you receive them in your possession?

A. Mr. Earnshaw turned over to me two notes with two certificates of the stock of The Second National Bank attached, that is one certificate to each note.

Q. Where are those certificates and notes, Mr. Cash?

A. I had them on my table in my office in the Union Trust building at the time of the fire. I had them out on my desk with other papers in connection with it the afternoon of the fire.

Q. Do you remember when the fire was?

A. It was about the first of January, 1913.

Q. What did the fire do to those documents, if you know?

A. The fire destroyed those papers as well as everything else that I had in the room, my desk in toto, didn't leave a sign hardly of it, the file-case, chairs, carpet, table, everything.

Q. Before the destruction of the notes, Mr. Cash, did you have made a copy of the Doyle note?

A. I did.

Q. For what purpose?

A. I had it made for the purpose of sending it to the Okeana bank.

Q. You have in your hand a paper. Will you state whether or not that is a copy made in your office of the note which was in existence at that time?

A. I had two copies of this note, and I am not absolutely sure which one or both of them were made in the office. I think
92 this one was, the one I have. They seem to be of different colored ribbon, that is the reason I am puzzled about it. They are exactly the same, so far as I have been able to see, exactly the same.

Mr. Moulinier: We desire to offer this note in evidence.

Mr. Peck: I would like to cross examine him on the voir dire.

Cross-examination on the Voire Dire.

By Mr. Peck:

Q. Did you make these copies?

A. I did not, Mr. Peck.

Q. Did you compare them with the original yourself?

A. I always do if I have a copy of any paper made in the office before it goes out. That has been my regular custom, and I have no doubt that I did it in this case.

Q. Have you any recollection of having compared these with the original document?

A. Well, no independent recollection beyond that.

Q. They were made by a stenographer or typewriter?

A. Yes, and they were intended to be exact copies because of the interlineation—

Q. I didn't ask you what the intention was.

A. Well, I have no doubt but what they were.

Mr. Peck: I move to strike out the opinion of the witness.

The Court: It will go out.

Mr. Peck: I object to the document.

The Court: Mr. Cash, basing your recollection as you say, is it your best recollection that these papers here were examined with the originals?

93 A. It is my recollection. I say, it is my invariable custom, and because I have written and compared thousands of papers, I don't remember this particular one, at this particular time.

The Court: The paper will be received.

To which ruling of the Court Counsel for defendant excepted.

The said paper was admitted in evidence, read to the jury, and is attached hereto as part hereof, marked Exhibit #34.

Direct examination, continued.

By Mr. Moulinier:

Q. Mr. Cash, after the receipt of the notes and stock did you see the President of the Second National Bank in connection with making a tender to him of those documents?

A. I did.

Q. What is the date?

A. The date is July 22, 1912.

Q. Who did you see at the bank at that time?

A. I saw Mr. Bosworth, the president of the bank.

Q. Did you hand him anything?

A. I did, I handed him the certificates, the notes and also a letter explaining my mission there.

Q. What did he do or say?

A. Mr. Bosworth said that he couldn't do anything about it, and couldn't accept them, but he would refer the whole matter

to Judge Jelke, the Counsel for the Bank, and that I would hear from him, as I recall it.

94 Q. Did you after that receive any word from Judge Jelke in connection with that conversation?

A. I did. I received a letter from Judge Jelke.

Q. Have you the original letter from Judge Jelke?

A. I have not.

Q. Have you copies of the letter that you showed Mr. Bosworth and the answer from Judge Jelke?

A. I have a copy of the letter that I delivered to Mr. Bosworth, the President of the Bank at that time, and I also have a copy of the letter that I received from Judge Jelke dated July 25, in answer to my letter handed to Mr. Bosworth.

Q. What became of the original of the answer received from Judge Jelke?

A. Both of those, both my letter and Judge Jelke's letter were burned up in the fire at the Union Savings Bank and Trust Company, and the copies that I have were furnished me by Judge Jelke subsequently.

Mr. Moulinier: We desire to offer those copies in evidence.

Counsel for defendant objected, and the objection was sustained.

Q. Mr. Cash, at the time that you saw Mr. Bosworth, on the 22nd of July, 1912, what did you say to him and what did he say to you——

Counsel for defendant objected.

Q. —confining your testimony to the matter of the tender, what he said to you?

Counsel for defendant objected; objection overruled, to which ruling counsel for defendant excepted.

95 A. Well, I explained to him that I came there to tender back to the bank these two notes and these two certificates of stock and to demand of the bank the money which the First National Bank of Okeana claimed was due them by reason of that fact.

Mr. Peck: This was on the 22nd of July, 1912?

A. The 22nd, yes. Then he answered me as I have stated, that he couldn't do that, that he would submit the matter to Judge Jelke and I would get an answer from him, which I did.

Q. State whether or not after that Judge Jelke or anybody else representing the Bank accepted the notes and stock and paid the money that you claimed to be due to the Okeana Bank?

A. He did not, they were burned up.

Q. Burned up later on?

A. Yes. Just one matter. This note which is spoken of as the Doyle note and which had the certificate of E. E. Galbreath attached, also had another memorandum attached to it, which was there at the time, but which, of course, is destroyed, too, a memorandum with the signature of E. E. Galbreath attached.

Q. Can you remember what the memorandum stated?

A. It was just a piece of paper pinned with the rest of them

in substance: "I hereby authorize I. Doyle to pledge the number of shares of stock on loan," that is in substance what it was, and signed by E. E. Galbreath as I remember it, that was a slip attached to it.

Cross-examination.

By Mr. Peck:

Q. On the 22nd of July, 1912, when you had this conversation with Mr. Bosworth, did he accept the notes and the certificates of stock from you?

A. No, he said he wouldn't take them.

Q. You took them home with you?

A. I carried them away with me. I think I told him at that time I would leave them with him to consider them if he wanted to. He didn't want them, said the matter would be referred to Judge Jelke.

Q. That was your first communication with Mr. Bosworth in the matter?

A. I think it was, the first and last as far as I remember.

(The witness leaves the stand.)

Mr. Cash: I want to offer in evidence a letter produced from the custody of the Second National Bank, dated March 4, 1914, from T. P. Kane, Deputy, and Acting Comptroller, to "The Board of Directors, The Second National Bank."

At this point the Court adjourned until to-morrow morning, March 25, 1915, at ten o'clock.

Morning Session, March 25, 1915—Ten O'clock.

The Court: I will pass the production of that letter for the present.

Mr. Cash: There is no objection to it because I have not produced the custodian of it or anything of that sort?

Mr. Peck: We do not object to it on the ground of the custody. We object to it on every other ground to which our objection may reach. We will admit that Mr. Bosworth is president of the Second National Bank and that this letter is produced from the files of the Second National Bank.

The Court sustained said objection; to which ruling Counsel for Plaintiff excepted.

The said letter was marked for identification by the stenographer ID. #35."

F. W. EARNSHAW, who has heretofore testified being recalled or further examination, testified as follows:

Direct examination.

By Mr. Cash:

Q. You were asked yesterday to produce a draft which you say you drew on the Second National Bank; and I hand you this paper and ask you whether that is it or not?

A. That is.

Q. And all the papers connected with it?

A. Yes.

Mr. Cash: We offer that draft.

The said draft was admitted in evidence, read to the jury and is attached hereto as part hereof, marked "Exhibit #36."

Q. This draft that you have produced, where did you produce it from?

A. Our files in our bank.

Q. Was it or not paid?

98 A. It was not paid.

Q. Has it been up to this time?

A. No.

Q. The draft is dated April 12, 1912. "Pay to the order of the First National Bank of Cincinnati, Ohio—" is that stamp put on by your bank?

A. Yes, sir.

Q. Mr. Earnshaw, coming back now to the Galbreath note of \$2,500.00, what was the form of that note, can you give us what it was, the words, in other words?

A. No, I couldn't give them. It is on their usual form.

Q. On whose usual form?

A. The Second National Bank.

Q. That is the usual printed blank, is it?

A. Yes.

Q. What was the amount of it?

A. \$2500.00.

Q. And the date you have given us, and secured by what?

A. Eleven shares of Second National Bank stock.

Q. Do you remember the number of those certificates?

A. I do not.

99 Cross-examination.

By Mr. Peck:

Q. Mr. Earnshaw, I want to ask you a few questions I forgot to ask you yesterday, and which I have thought of since. When you got back on April 15, Monday, April 15th, when you got back to Okeana with the notes and the certificates of stock which you took away with you, did you have a directors' meeting up there at Okeana of your bank?

A. I don't believe we did.

Q. Did you discuss the matter with any of the Board of Directors?

A. I discussed it with some of my directors, yes.

Q. And the president was down here with you that day, wasn't he, Mr. Wagner?

A. The first time, no.

Q. He came down with you after you went back and told him how bad it was?

A. Yes, we came down then together.

Q. You told him that the thing was in an alarming condition, the loans?

A. Yes.

Q. And that you didn't think the collateral was good for the loans?

A. Yes.

Q. After you told Mr. Wagner that, he came down with you?

A. Yes.

Q. From the information you gained here upon the 15th of April, you knew that the collateral was not good for the loans, didn't you?

A. Yes.

100 A. Yes.

Q. The Enquirer of that day advised you that there was enough money to pay the depositors in the bank and possibly some for the stockholders, didn't it?

A. Something of the kind, yes. The depositors were guaranteed.

Q. Well, the depositors were all right?

A. Yes.

Q. The stockholders would get little or nothing?

A. Yes.

Q. And that was the information you had?

A. Yes.

Q. Didn't you ever have a board meeting of your directors on this subject up at Okeana?

A. I have my minute book here. That would show it if we did have.

Q. Have you any recollection of having had such a meeting?

A. Right at this time we may, and we have talked that over in meetings, yes.

Q. You talked it over in your meetings?

A. Yes.

Q. How long after you got back?

A. That we had a regular meeting in regard to the matter?

Q. Well, I don't mean necessarily with regard to this matter. How soon after you got back did you have a meeting of your directors at which this subject came up?

A. I couldn't remember that.

Q. Well, was it within a week?

101 A. As to that I couldn't say.

Q. How often did your directors meet?

A. Once a month they meet, regular meeting.

Q. What date in the month do your directors meet by law?

A. The first Monday.

Q. Then you probably had a directors' meeting the first Monday in May, didn't you?

A. I judge so, yes?

Q. Did you take this subject up at that time?

A. We no doubt did. I can't remember that.

Q. This was the most serious subject that you had on hand at that time, wasn't it?

A. No doubt it was.

Q. You didn't have many like this, did you?

A. We surely did not.

Q. You knew that it was serious, didn't you?

A. Yes, sir.

Q. You knew it involved a probable loss, didn't you?

A. Yes, sir.

Q. The day you went back from Cincinnati to Okeana you knew that, didn't you?

A. Yes, sir.

Q. Well, now, don't you recollect discussing the matter in a board meeting the first Monday in May?

A. No. It was the first Monday in May that they had a board meeting, about this time.

Q. Do you remember discussing this matter in the board meeting?

A. Yes, we discussed it in the board meeting.

102 Q. Have you any minute made on that occasion in the board, this first meeting?

A. I don't know whether we have or not.

Q. May I take your minute book?

A. Yes. (Hands Minute Book to Peck.)

Mr. Cash: We don't see the relevance of this. I don't know whether there is anything special.

The Court: I don't see the relevance of this point. It may lead to something.

Mr. Peck: Well, I give the assurance that I have a point.

The Court: I understand—that is the rule I made: if it leads to something, proceed.

Q. Upon page 57 I find this minute of your meeting: "Okeana, Ohio, May, 6, 1912. Directors of the First National Bank met in Directors' Room at 2:30 P. M. with the following present: C. Wagner, Ed. Heep, G. W. Jeffries, F. W. Earnshaw. Minutes previous meeting read and approved. Cashier's report of business read and approved. All loans made since the last meeting read and approved. Moved and seconded that we adjourn. Carried. F. W. Earnshaw, Cashier. Charles Wagner, President." That was all the action you took at the board meeting, this minute?

A. That is all it shows on our minutes, though we talked it over I suppose with—

Q. Of course, that day you discussed this bad loan that you had down at the Second?

A. Yes.

Q. Did you produce the papers in the directors' meeting?

103 A. I believe they had been turned over to Mr. Cash. I think it was on the date after I turned them over to Mr. Cash.

Q. Then if it was you didn't have them in this meeting?

A. I didn't have them in that meeting, no.

Q. You had had the papers in the safe up at Okeana for quite a while?

A. Yes.

(The witness leaves the stand.)

Mr. Cash: I want to offer if your Honor please, the financial statement published, the published statement of January 11, 1911, which appeared in the Cincinnati Enquirer on Wednesday, January 11, 1911. Now, I will offer the entire statement and put it in.

Counsel for defendant objected.

After a discussion of the objection, Counsel for Plaintiff asked leave of the Court to amend the Plaintiff's reply herein.

Mr. Moulinier: I would suggest this, your Honor, as an amendment to the reply: "on or about the 9th day of January, 1911, and for a year thereafter, the defendant issued and published to the world sworn statements of its financial condition."

The Court: Are you ready to proceed under that amendment?

Mr. Peck: We are in an embarrassing situation. If the Court allows the amendment, why, then, we either have to proceed or ask the Court for a continuance of the case. Of course we are very loath to lose the time, but we have gone to trial and I would want to discuss with my colleagues before I reply to your Honor's question.

Thereupon the Court took a recess until this afternoon at two o'clock.

Afternoon Session.

March 25, 1915—two o'clock.

Mr. Moulinier: The amendment that we ask is on page 2 of the reply, beginning at the first open paragraph, instead of the first three lines we propose to amend as follows, "Plaintiff further says that on or about the 11th day of January, 1911, and thereafter during that year of 1911, the defendant published to the world and delivered to the plaintiff sworn statements of its financial condition," and from the word "condition" on, the reply would be the same.

The Court: I will exercise my discretion and allow the amendment, in the absence of some showing by Counsel for the Defendant that that will substantially change the requirements of their preparation. In other words, my discretion must be exercised upon what is made to appear. It does not appear to me, without anything being said, that it will substantially handicap the defense, or require additional time.

Mr. Peck: It is difficult for us to state just what the effect of that will be. We stated we prepared the case on the pleadings. As to that investigation or condition in 1911, additional investigation, if any, we would be called upon to make, I haven't and I don't believe my colleagues have fully determined. I don't know that we can determine what, if anything, we will have to do -- to what we have already done. It depends upon the case as the same may develop.

The Court: In the absence of showing by professional statement otherwise, that it would require further time on the part of the defendant, I will allow the amendment and order the case to proceed. I will add to that this, that if by statement of Counsel, this morning Thursday, that even by Monday that additional preparation

could be had, I would be willing to hear from you on that score and act in view of what appears.

Mr. Peck: Well, of course, I am not going to make any statement to the Court unless I am absolutely sure of its correctness, and I don't know.

The Court: Then I will permit the amendment and order the case to proceed.

Mr. Peck: We reserve an exception.

Mr. Cash: We offer the financial statement of The Second National Bank as it appears in the Cincinnati Enquirer of Wednesday, January 11, 1911.

Mr. Peck: I object. Mr. Earnshaw is here and certainly he can look at it. He said he would not testify he saw them all. In my cross examination he said he would not testify he hadn't overlooked some of them. If this is to be put in as founded upon his recollection of having seen that statement, it seems to me it ought to be, at least, presented to him and asked if he has a recollection of having seen it.

The Court: It is simply a question as to how far Mr. Earnshaw's testimony or recollection went.

Mr. Cash: We simply say it was published during these times. Of course, he could not say and it would not be true if he did say so, that he saw this paper, because this has been in the Public Library.

The Court: A duplicate of that paper.

Mr. Cash: A paper of those times giving the bank statement.

The Court: It depends upon what the statements showed themselves.

Mr. Cash: Of course, Mr. Earnshaw, your Honor will recollect, said each time they made these reports they sent him copies of them at the same time or about the same time they were published in the daily papers and the statements he received were so far as he saw, exactly the same as they were published in the papers.

106 The Court: It is simply a question of the extent of his testimony and I will receive it.

To which ruling — the Court Counsel for Defendant excepted.

Mr. Cash: Now, I will not read it all. I have offered it all, and as we have some copies there, I think the copies ought to go in, because these papers will have to go back to the Library.

The Court: You only offer this. Will it be agreeable to both sides that a copy of this shall be put in?

Mr. Peck: We are willing it may be copied so far as that part is concerned.

Mr. Cash: I will only read three items. If any others are wanted, I will read them, too—under the head of liabilities "Capital Stock paid in." This is headed "Second National Bank Statement," and at the top is "Report of the Second National Bank of Cincinnati, in the State of Ohio, at the close of business on January 7, 1911." "Liabilities: Capital Stock paid in, \$1,000,000. Surplus Fund, \$1,000,000. Undivided Profits, less expenses and taxes paid, \$210,498.03." And at the bottom "State of Ohio, County of Hamilton, ss: I, G. W. Williams, Cashier of the above named bank, do

solemnly swear that the above statement is true to the best of my knowledge and belief. G. W. Williams, Cashier. Subscribed and sworn to before me this 10th day of January, 1911, Charles M. Leslie, Notary Public. Correct attest, John F. Robinson, John Omwake, Samuel J. Murray, directors."

Mr. Cash: I now offer the report of the Second National Bank, as published in the Cincinnati Enquirer, for Friday, March 10, 1911.

Counsel for defendant objected, objection overruled, to which ruling Counsel for Defendant excepted.

Mr. Cash: It is headed "Second National Bank, Report of the Condition of The Second National Bank at Cincinnati, in the State of Ohio, at the close of business, March 7, 1911." Under

the heading of "Liabilities: Capital Stock paid in, \$1,000,000. Surplus Fund, \$1,000,000. Undivided Profits, less expenses

and taxes paid, \$211,268.64." At the bottom, "State of Ohio, County of Hamilton, ss: I, J. G. Gutting, Cashier of the above named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief. J. G. Gutting, Cashier. Subscribed and sworn to before me this the 9th day of March, 1911, C. M. Leslie, Notary Public. Correct, Attest, John G. Robinson, William Albert, G. W. Williams, directors."

Mr. Cash: I offer the report of The Second National Bank appearing in The Cincinnati Enquirer of Saturday of June 10, 1911.

Counsel for defendant objected, objection overruled, to which ruling Counsel for Defendant excepted.

Mr. Cash: It is headed, "Second National Bank, "Report of the Condition of The Second National Bank at Cincinnati, in the State of Ohio, at the close of business June 7, 1911." Under the head of "Liabilities: Capital Stock paid in \$1,000,000. Surplus Fund, \$1,000,000. Undivided Profits, less expenses and taxes paid, \$143,447.11." At the bottom, "State of Ohio, County of Hamilton, ss: I, J. G. Gutting, Cashier, of the above named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief. J. G. Gutting Cashier. Subscribed and sworn to before me, this 9th day of June, 1911. C. M. Leslie, Notary Public. Correct, Attest, C. H. Davis, Lee H. Brooks, John F. Robinson, directors."

Mr. Cash: I offer the report of the Second National Bank appearing in the Cincinnati Enquirer of Wednesday, September 6th, 1911.

Counsel for defendant objected, objection overruled, to which ruling Counsel for Defendant excepted.

Mr. Cash: Under the heading, Second National Bank, Report of the Condition of The Second National Bank of Cincinnati, in the State of Ohio, at the close of business September 1st, 1911. Under the head of "Liabilities: Capital Stock paid in \$1,000,000. Surplus Fund, \$1,000,000. Undivided Profits less expenses and taxes paid \$106,874.31." "State of Ohio, County of Hamilton, ss: I, J. G. Gutting, Cashier of the above named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief. J. G. Gutting, Cashier. Subscribed and

sworn to before me this 5th day of September, 1911. C. M. Leslie, Notary Public. Correct, Attest, Lee H. Brooks, C. H. Davis, William Albert, directors."

Mr. Cash: I offer the report of The Second National Bank appearing in The Cincinnati Enquirer on December 8, 1911, under the heading, "Second National Bank. Report of the Condition of The Second National Bank of Cincinnati, in the State of Ohio, at the close of business December 5, 1911." Under the head of "Liabilities: Capital Stock paid in, \$1,000,000. Surplus Fund, \$1,000,000. Undivided profits, less expenses and taxes paid, \$113,041.07."

To all of which Counsel for Defendant objected, objection overruled, to which ruling Counsel for Defendant excepted.

Mr. Cash: I offer the report of The Second National Bank appearing in the Cincinnati Enquirer of February 25, 1912.

Counsel for Defendant objected, and the objection was sustained to which ruling of the Court, Counsel for Plaintiff excepted and avowed that if the said report were permitted in evidence it would show under the heading of "Liabilities, Capital Stock paid in \$1,000,000. Surplus Fund, \$1,000,000. Undivided Profits, less expenses and taxes paid, \$103,105.41;" and that the report says that

that was the condition of the Bank at the close of business 109 February 20, 1912; that the said report is sworn to by J. G.

Gutting, the same as the others before Charles M. Leslie, Notary Public, and "Correct, Attest, E. E. Galbreath, John G. Robinson, William Albert, directors."

F. W. EARNSHAW, who has heretofore testified, was recalled to the stand for further Cross Examination and testified as follows:

Cross-examination continued.

By Mr. Peck:

Q. Mr. Earnshaw, this is a Minute Book of your Bank, isn't it?

A. Yes, sir.

Q. I wish to get the action which your Board of Directors took from time to time regarding these notes. In your Minute — of January 9, 1912, I see that it says that, "Loans made since the last meeting were examined and approved."

A. Yes.

Q. That would include the loan which was made in December to Galbreath?

A. Well, no, it is the report of the loan, the statement that I have here, the loan itself was not examined, but the report of it was approved.

Q. You mean the note?

A. The amount and the collateral was approved.

Q. And the amount reported, the name of the maker and the collateral?

110 A. The name of the maker and the collateral, yes.

Q. It was approved?

A. That was approved.

Q. Now, on January 9th, I see you had a meeting. No action was taken, however, was there about these notes at that time?

A. No.

Q. On February 5, I see that it was moved and seconded that all loans made since last meeting be approved, and carried.

A. Yes.

Q. That was carried, wasn't it?

A. Yes.

Q. That included the loan you made to I. Doyle?

A. Yes.

Q. That is in question in this case?

A. Yes.

Q. On March 4th, no action concerning these notes was taken. That was your next meeting, wasn't it?

A. Yes.

Q. No action concerning these notes was taken?

A. No.

Q. On April 1st, was your next meeting, wasn't it?

A. No.

Q. No action taken concerning these notes of Mr. Galbreath of Mr. Doyle?

A. No.

111 Q. The next meeting appears to have been May 6, 1912?

A. Yes.

Q. That is the meeting concerning which you have heretofore testified that you brought the matter before the Board, these notes before the meeting?

A. Yes.

Q. But no action was taken by the Board there?

A. Not by the Board. They had already been placed in the hands of the attorney by our President, who has a right to sue on notes.

Mr. Peek: Well, I move to strike out that as not responsive. All I am asking is whether any action was taken by the Board at that time.

The Court: I think that should go out in this connection.

Q. Now, your next meeting was held upon July 8th, 1912?

A. Yes.

Q. And at that meeting no action was taken concerning these notes, was it?

A. No.

Q. The next meeting was August 5, 1912, wasn't it?

A. Yes.

Q. And at that meeting no action was taken concerning the notes?

A. No.

Q. The next meeting of your Board of Directors appears to have been October 7, 1912?

A. Yes.

12 Q. I note that the Minutes say that "It was moved and seconded that at the close of business October 31, 1912, when

books are closed for six months ending at that date, \$500.00 placed to surplus and \$500.00 be credited on the \$2,500.00 note E. E. Galbreath. Carried."

Counsel for Plaintiff objected and moved that that portion of the Minutes just read by Mr. Peck be stricken out, motion overruled, which ruling, Counsel for Plaintiff excepted.

Q. I have read that as it appears on your Minutes, have I not?
A. Yes.

Counsel for Plaintiff objected, objection overruled, to which ruling Plaintiff excepted.

Q. The next meeting of your Board appears to have been November 4, 1912?

A. Yes.

Q. No action was taken in connection with these notes at that time?

A. No.

Q. The next meeting of the Board was held on December 2, 1912?

A. Yes.

Q. And no action taken concerning these notes?

A. No.

Q. On January 6, 1913, a meeting of the Board of Directors was held, wasn't it?

A. Yes.

Q. That was the next meeting?

113 A. Yes.

Q. I see then "It was moved and seconded that the balance of loan of E. E. Galbreath of \$2,000.00 be charged off to Surplus and that loan of I. Doyle \$2,500.00 be carried as claims, judgment, etc." That was carried, was it not?

Counsel for Plaintiff objected; objection overruled, to which ruling Counsel for Plaintiff excepted.

Q. Well, then, upon this date, I refer to January 6, 1913, the action taken by your Board as indicated by your Minutes was, I have read, that the balance of loan of E. E. Galbreath for \$2,000.00 be charged off to Surplus?

A. Yes.

Q. And that the loan I. Doyle, \$2500.00, be carried as claim, Judgment, etc.?

A. Yes.

Q. Which was carried?

A. Yes.

Q. Now, your next meeting was January 20, 1913, wasn't it?

A. Yes.

Q. No action was taken regarding these notes at that time?

A. No.

Q. The next meeting was January 25, 1913?

A. Yes.

Q. And at that time the Board of Directors passed a resolution that the note of I. Doyle for \$2500.00 be charged therefrom, that is from Surplus?

114 Counsel for Plaintiff objected; objection overruled, to which ruling Counsel for Plaintiff excepted.

A. Yes.

Q. That was the action taken at that time?

A. Yes.

Q. Now, that was or was not, the last action that the Board of Directors ever took concerning these two notes, or any matters connected therewith?

A. As far as I can remember that is all it says.

Q. If your recollection isn't clear, will you please glance through the remainder of your meetings and refresh your recollection and tell us if any further action was ever taken by this Board of Directors concerning these notes or the matter connected with this case?

A. They were discussed several times but nothing in the Minutes.

Q. No action was ever taken after that?

A. No.

Redirect examination.

By Mr. Cash:

Q. Mr. Peck has called attention to the Minutes of your Board of Directors that appears to have been held on January 25, 1913, where \$500.00 was carried on your Undivided Profits on account of the Galbreath note, and the \$2500.00 Doyle note was charged off, is that correct?

A. \$500.00 was carried to the Surplus.

115 The Court: Speak out.

Q. What did you say was done?

A. \$500.00 was charged to the Surplus Account. The \$2500.00 Doyle loan charged off of our books.

Q. Entirely?

A. By order of the Examiner.

Q. What examiner?

A. The National Bank Examiner.

Q. Who was the National Bank Examiner?

A. Mr. George DeCamp.

Q. Did you follow his orders?

A. Yes.

Q. And charge it off?

A. Yes.

Q. Did you carry that note any further than this point as an asset of your Bank?

A. No.

Q. In any statement that you have made of the financial condition of your Bank, is that carried as an asset?

A. Since that time?

Q. Yes.

A. No.

A Juror: Is that the Doyle note?

Q. That is the Doyle note. What became of the Galbreath note?

A. It was charged off previous to that time.

Q. Charged off by orders of whom, if anybody?

116 A. Well, that was by order of the National Bank Examiner.

He talked to us about it and told us we would have to get them out of the bank.

Q. Do any of your statements of your financial condition published in the newspapers, or sent out to your correspondents, in any way treat either of these notes as an asset of the Bank since they were charged off?

Mr. Peck: Up to that time they were carried as assets in your statements?

A. Yes.

Counsel for Plaintiff moved the Court to strike out that portion of the Cross-examination of the Witness where there was introduced a portion of the Minutes of the Board of Directors of the Plaintiff at a meeting held October 7, 1912, and also of the meeting of January 6, 1913; and the Court overruled said motion, to which ruling of the Court, Counsel for Plaintiff excepted.

(The witness leaves the stand.)

J. G. GUTTING, being first duly sworn, testified in behalf of the Plaintiff as follows:

Direct examination.

By Mr. Cash:

Q. Mr. Gutting what is your name?

A. John G. Gutting.

Q. And your present official position, if you have any, with the Second National Bank?

117 A. Cashier.

Q. How long have you been connected with the Second National Bank?

A. Almost thirty years.

Q. And since what time as Cashier?

A. I was elected Cashier, I think it was, in January, 1911.

Q. Do you know the date?

A. The regular annual meeting.

Q. What date is that?

A. I don't recall that.

Q. Mr. Gutting, as Cashier of the Bank, have you produced and have you here the letter or order from the Comptroller of the Currency, of July, 1912?

A. In July, 1912?

Q. Yes.

A. Yes, sir.

Q. Where is that?

(The witness indicates the letter.)

Q. Is that the original letter you have there?

A. Which one do you refer to?

Mr. Moulinier: We made a mistake, it was April.

Q. Is that the original letter that you have produced?

A. Yes, sir.

Q. What is the date of that letter?

A. April 15, 1912.

118 Q. I will ask you to read that letter. We offer that letter and would ask you to read it.

The Court: This refers to another paper.

Mr. Moulinier: Well, the following papers, we offer both.

Mr. Peck: We object to each one separately and severally.

The said objection was overruled, to which ruling Counsel for Defendant excepted.

Thereupon Mr. Cash read the said letter and the paper attached thereto as follows:

"Treasury Department, Washington, April 15, 1912." This is a letter heading "Office of the Comptroller of the Currency." Below, "address reply to the Comptroller of the Currency."

"The Board of Directors, The Second National Bank, Cincinnati, Ohio. Gentlemen: The Examiner reports that the capital of your bank is entirely absorbed by losses. A formal notice of impairment of capital in the sum of \$1,000,000 is enclosed with directions to make the deficiency good by an assessment of the stock, or to place the association in voluntary liquidation as required by law. As Section 5205 U. S. R. S. requires an assessment of stock to make good an impairment of capital to be collected within three months from the date of the receipt of the Comptroller's notice of such impairment, the directors should give each and every shareholder of the association immediate notice of a meeting to be held in thirty days for the purpose of voting on the question of the payment of the assessment, or the placing of the association in liquidation, in
119 order that they may be in a position at the end of three months from the date of the receipt of this notice to advertise, as provided by Section 4, Act of June 30, 1879, the sale of the stock of any delinquent shareholder to make good his proportion of the assessment."

In the line between the typewritten part is the word "Notice," in pencil, and then the next line begins:

"At the Shareholders' meeting no director, or other officer, or employee shall act as proxy and vote the stock of another shareholder. The form of notice to such shareholders is enclosed together with a blank for certifying that shareholders voted to pay an assessment, and a blank for certifying to this office when the assessment has been entirely paid in. Voluntary liquidation blanks will be forwarded upon application.

Respectfully, Lawrence O. Murray, Comptroller."

At the bottom "Enclosures."

"Treasury Department. Office of the Comptroller of the Currency, Washington, D. C., April 25, 1912.

Whereas, it appears to the satisfaction of the Comptroller of the Currency that the capital stock of The Second National Bank, Cincinnati, Ohio, has become impaired to the extent of \$1,000,000; and

Whereas, Section 5205 of the Revised Statutes of the United States provide- that every association whose capital stock shall have become impaired by losses or otherwise shall within three months

120 after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock by assessment upon the shareholders pro-rata for the amount of capital stock held by each.

"Now, therefore, notice is hereby given to said association to pay said deficiency in its capital stock in the manner provided by said Section of the Revised Statutes; and if such deficiency shall not be paid and said bank shall refuse to go into liquidation as provided by law, within three months after this notice shall have been received by it, a receiver will be appointed to close up the business of the association according to the provisions of Section 5234 of the Revised Statutes of the United States.

"In Testimony Whereof, I have hereby subscribed my name and caused my seal of office to be affixed to these presents at the Treasury Department in the City of Washington, and District of Columbia, this 15th day of April A. D. 1912. Lawrence O. Murray, Comptroller of the Currency."

In the left hand corner is the seal "Bureau." In the inner margin, "Seal of the Comptroller of the Currency," and on the lower part of the outer margin "Treasury Department." And below that "To the Second National Bank, Cincinnati, Ohio."

Q. Was that letter and notice from the Comptroller received by the Second National Bank?

A. Yes, sir.

Q. Do you know when it was received?

A. I think that the mark is up there in the corner of the letter.

Q. It is actually received April 18, 1912. Whose signature is that?

121 A. Samuel L. McCune, Vice-president at that time.

Q. What action, Mr. Gutting, if any, was taken by the Board of Directors of the Second National Bank in response to that notice?

A. I don't know except just from hearsay. I had no connection with the Board at that time.

Q. Didn't you keep their records?

A. No, I was not Secretary of the Board. Mr. McCune was.

Q. Do you know whether they followed out the instructions of the Comptroller in the letter?

A. I know that there was an assessment levied against the stockholders of the bank, and it was collected.

Q. It speaks of a notice sent out to the shareholders. I will ask

you if that is the form of notice which was sent out to each one of the shareholders? (Indicating.)

A. I can't tell you that. I had nothing to do with the mailing of those notices.

Q. Did you see them?

A. I seen this notice here, but I don't know whether that was mailed to the shareholders or not. I presume it was, that is all I can say. I can't say positively.

Q. What was the date of that assessment as fixed, do you recall?

A. I don't recall.

Q. Did you have anything to do with the sending out of the notices of assessments as called for in that order of the Comptroller?

122 A. Nothing at all, no sir.

Q. Did you see the notices that were sent out?

A. I can't recall. I may have, but I can't say positively.

Q. Did you get any such notice yourself?

A. I can't say that. I had stock, I presume I must have, but I can't say positively that I did.

Q. Weren't you at the meeting of the stockholders that was held on July 6th, 1912?

A. No, sir.

Q. When this resolution was passed?

A. No, sir.

Q. You do know that the assessment when called for, whenever it was, was paid?

A. Yes, sir.

Q. And the bank is still in existence?

A. Yes, sir.

Q. It did not go into liquidation?

A. No, sir.

Q. Mr. Gutting, as cashier of the Second National Bank, did you make up and forward to the Comptroller of the Currency reports of the financial condition of the Second National Bank during the year 1911?

A. I don't think all of them. I think the first report was made by Mr. Williams, and I made the rest of them.

Q. Have you got those reports?

A. I think they are here, yes sir.

123 Q. I don't suppose you have the original, that would be in the Comptroller's office?

A. Yes, sir.

Q. But you kept a copy of it, didn't you?

A. Yes, sir.

Q. Would you be willing to say that those copies you have there are correct copies of what you sent to Washington?

A. To the best of my knowledge and belief they are, yes sir.

Q. You have handed me now what reports, for what year?

A. 1911.

Q. Five of them, there were five of them made in 1911?

A. Yes, sir.

Q. Were there any more than five during that year?

A. No, sir.

Q. Now, you say that the first of these, if I understand you, was made out by Mr. Williams?

A. I think so. I think that was before I was elected cashier. Yes, sir, that was made out by Mr. Williams.

Q. And by you the rest of those?

A. Yes, sir.

Q. Now, first let me ask you in connection with these reports, did you publish a copy of these reports in the Cincinnati papers?

A. Not a copy of those. We published a copy of the form to be published, not that form.

Q. Do I understand, then, that the Government furnishes you two forms?

124 A. Yes, sir.

Q. One to be sent to the Comptroller's Office?

A. Yes, sir.

Q. And one to be published in the papers?

A. Yes, sir.

Q. You made those out, too, did you?

A. Yes, sir.

Q. In what papers did you publish these in 1911?

A. I can't tell, the Enquirer I think. Sometimes we published in one paper, and sometimes in the other, but almost always in the Cincinnati Enquirer.

Q. You have no notation as to what paper you published them in?

A. Those are not the reports that we published. Those are the ones that went to Washington.

Q. Have you got the reports that were published?

A. What specific statement do you refer to?

Q. I want for the same time, 1911.

A. I can't tell you what paper the one of January 7th was published in. There is no record here to show which paper it was published in. It wasn't necessary to put a memorandum—sometimes a memorandum was put on or the lead pencil memorandum was put on to show what paper they was supposed to be given to.

Q. Didn't you publish them in more than one paper?

A. Sometimes, not necessarily, didn't have to publish them in more than one.

Q. Were not all of these reports published in the Commercial-Tribune of this City?

125 A. I don't know what paper the one of January 7th was in. Q. I mean all of them, these five that I have in my hand—I don't mean these papers, the reports that you speak of, in this time?

A. I can't tell. I have one of them in my hand here, this one of January 7th don't show where it was published. I can't tell you from this report where it was published. I said I know we made a practice of publishing some of them in the Enquirer, and whether they were published in other papers or not, I don't know.

Q. Have you the reports that you published in the papers for the year 1911?

A. Which one, all five of them?

Q. Yes.

A. I have three of them.

A Juror: May I ask the witness a question? Are your undivided profits that you report in the papers identical with the report that you make to the Treasurer?

A. That we send to the Government?

A Juror: Yes.

A. I think they are, yes, sir.

Q. Mr. Gutting, you heard my statement of the undivided profits, capital stock, etc., of the Second National Bank as published in the Cincinnati Enquirer, during the year, 1911. Were those
126 figures the same as in the report that you sent to the Government?

A. Why, I couldn't tell without comparing them, but they sounded about right.

Q. Now, we will take the first one first, take the one of January 7th. Can you tell us in what way these reports differ, if any,—the report which you have in your hand which you say was published, you may call them a published report?

A. Yes, sir.

Q. The one that you sent the Comptroller?

A. One is condensed from the other. This is the form in which everything is itemized in full, this is condensed.

Q. Where the figures appear, would they be the same on the report that you sent to the Comptroller of the Currency that you have in your hand and that you published?

A. If you mean capital stock, surplus, and profits, that would be the same, those three items would be the same.

Q. Let us see, take your report of January 7, 1911, what does that published report show as to capital, surplus, and undivided profits?

Counsel for defendant objected.

The Court: You are asking as to the reports to Washington?

Mr. Cash: No, that report that he published in the paper. I want to compare it with the report he sent to Washington.

127 The Court: Is it agreed that the Enquirer publication is that made by The Second National Bank on different occasions?

Mr. Peck: It has all been offered and admitted in evidence, your Honor.

The Court: What is the purpose of this, to show these newspaper reports, or the reports of the bank—

Mr. Cash: Not only that, to show the reports that he made up himself are the ones from which the publication were made, that they are the same as the publication, and that the reports that he made to the Comptroller of the Currency are the same as to these items that we have read.

Q. You said the reports in the Enquirer which I read were made by the Second National Bank, you made four of them from copies which you had made up yourself?

A. Yes, sir.

Q. And the first one from a copy made up by Mr. Williams. Now, Mr. Gutting, when you made up copies of the financial statements of the Second National Bank, did you send out this statement to anybody?

A. No.

Q. Who had charge of that?

A. We didn't send out the statement to anybody. They never were sent.

Q. What did you send out, if anything?

A. We had a further condensed statement printed, which was mailed sometimes, and sometimes it wasn't.

128 Q. Was that sent to your correspondents, your country banks?

A. Not always, sometimes.

Q. Not always?

A. No, sometimes it was and sometimes it wasn't.

Q. Didn't you have a regular mailing list of your correspondents everywhere, and when you made out a report you sent a condensed form of that report?

A. Not always.

Q. Whose business was it to do that?

A. Oh, the officers of the bank, but it is the cashier who generally sees to it that it went out, if we sent them out. We didn't always send them out, though, that is a matter of form. It isn't necessary to send out a statement of that kind. Sometimes we have one printed up and mailed out, others we don't.

Q. You do sometimes send them out?

A. Yes.

Q. Did you send some of them to the Okeana Bank?

A. I can't recall that.

Q. But that condensed report that you made out, would that be the same as the report that you have in your hand for the particular time?

A. Condensed, it would not.

Q. What do you mean by condensed?

A. It would be this report still further condensed.

Q. Would there be any further condensation on the capital stock?

129 A. No.

Q. On the surplus and undivided profits?

A. No.

Q. And those reports that you sent out that way would be the same as the report that is published in the paper?

A. Yes, sir.

Q. As to those three items?

A. As to those three items, yes, sir.

Q. And you have three of those, have you?

A. Yes, sir.

Q. From which this publication is made. I want to offer these.

if your Honor —, I want to offer the other two if I can get them after —, that is an office copy.

The Court: Any paper that is admissible can be introduced here by copy. I think there will be no objection.

Mr. Peck: None in the world.

Mr. Cash: I offer a copy, then, of the statement made January 7, 1911, a copy of the report made by Mr. Gutting that was in the paper.

A. That is not the one that was made by me, that was made by Mr. Williams.

Counsel for defendant objected.

Q. You know Mr. Williams' signature, don't you?

A. I don't think it is on there. Yes, it is, that is his writing.

Counsel for defendant objected.

The Court: What is this paper, Mr. Gutting?

130 A. This is supposed to be the copy that was sent to the papers for publication, is what the Government calls "the publishing copy."

The Court: The copy that the printer made up his form from?

A. Yes, sir.

Q. You make up two copies?

A. Yes, sir.

Q. And they are identically the same?

A. Yes, sir.

Q. One of them you give to the newspaper- to set up their type from?

A. Yes, sir.

Q. And the other you retain in your files?

A. Yes sir, that one goes to the newspapers comes back to us and afterwards goes on to Washington. There is an original like that sent to Washington. Washington has two originals sent, one is given to the newspapers to be published and the other one we send direct to them.

Q. Did you compare the two when they came back from the paper?

A. No.

Q. Did you look over the statement to see whether they had taken your statement correctly?

A. No.

Q. You didn't do that?

A. No, we were not interested, because they certify that they have done so, they give us a signed statement that they have done

131 so, and we are not interested any further when they do that.

Q. When they gave you a sworn statement, didn't they also furnish you a copy of the publication in the paper?

A. That goes on to Washington.

Q. You send that on to Washington?

A. Yes, sir.

Q. So then, it is just a cut-out portion of the paper, isn't it?

A. Yes, sir.

Q. Attached to the sworn statement?

A. Attached to this form sent to Washington.

Q. So that you haven't that in your files?

A. No, sir.

Mr. Cash: I want to offer this, if your Honor please, of January 7th, and I want to read just the same three items I read from the newspaper.

Counsel for the defendant objected, and the objection was sustained.

Q. With the exception, Mr. Gutting, of the different reports that you make up to the Comptroller for the newspaper- or to be sent out to your correspondents, the items, so far as the statements of your capital stock, your undivided profits, and your surplus account, would be the same in each, would it not?

A. Yes.

Q. Are the notations on the other two reports that you have produced, in your handwriting?

A. Yes, sir.

132 Q. What do they indicate?

A. Indicate they were published in those papers.

Q. What papers?

A. Enquirer, Commercial-Tribune, Freie Presse, Volksblatt, Times-Star and Post.

Q. All Cincinnati papers?

A. Yes, sir.

The Court: Each one and all of them?

A. Yes sir, each one of these two.

Q. The other two publishing reports for that year you haven't found yet?

A. No.

Q. In the reports that you made to the Comptroller of the Currency, that is on a form prescribed by him, isn't it?

A. Yes, sir.

Q. Does the report that you make to the Comptroller of the Currency show the call loans that you have made for other people?

A. It shows it in total.

Q. Where do you get that total?

A. From the bank, we carry the loans in the bank, we make for other people and we get the total from the loans. We carry the loans for the correspondents, we hold them in trust, and with them there it is easy to get the total of them.

Q. So that all you put in your report to the Comptroller is the total amount of those loans?

133 A. Yes, sir.

Q. Under what items is that put in?

Counsel for the defendant objected, objection overrules, to which ruling Counsel for the Defendant excepted.

A. Item X of the third page of the report.

Q. What is the item, read it.

Counsel for the defendant objected, objection overruled, to which ruling Counsel for the Defendant excepted.

Mr. Cash: I want to offer this report, if your Honor please, so that we can have it all in, so that there can be no question about it, as the witness has testified it is a copy of the report sent to the Comptroller of the Currency.

The Court: If it is objected to, it should be confined to one point. I will sustain the objection to all except that point.

To which ruling of the Court, Counsel for Plaintiff excepted.

The Court: If it is admissible for any purpose, the paper will have to go in unless I can control this by consent. It will be read in the record, and that course will be adopted.

Mr. Peck: We do not make any point about the particular document.

Mr. Cash: And this was in the report of January 7, 1911: "Loans for account of correspondents made from their funds \$397,561.82."

Q. Now, the next report of 1911 is March, I believe, is it, is that the next one of these four?

134 A. Yes, sir.

Q. Is that paper a copy of the report that you made of that date to the Comptroller of the Currency?

A. Yes, sir.

Mr. Cash: I want to offer that.

Counsel for defendant objected, and the Court sustained the objection, as to the report as an entirety, to which ruling of the Court Counsel for Plaintiff excepted.

Q. Now, in the report of March 7, 1911, is the item of the same character: "Loans for account of correspondents made from their funds, \$644,962.00?"

Counsel for defendant objected, objection overruled, to which ruling Counsel for Defendant excepted.

Q. Now, I show you a copy of a statement June 7, 1911, and ask you if that is a copy of the statement that you sent to the Comptroller of the Currency on that date?

A. Yes, sir.

Q. And of that report?

A. Yes, sir.

Mr. Cash: I want to offer that in evidence.

Counsel for the Defendant objected, and the Court sustained said objection as to the report as an entirety, to which ruling of the Court, Counsel for plaintiff excepted.

Mr. Cash: Now, the item in the June report, "Loans for account of correspondents made from their funds, \$463,349.80."

135 Counsel for the defendant objected; objection overruled, to which ruling Counsel for Defendant excepted.

Q. Now, the report that you have handed me is of what date?

A. September 1st, 1911.

Q. I will ask you the same question as to that, as to whether that is a correct copy of what was sent to the Comptroller of the Currency at that time?

A. Yes, sir.

Mr. Cash: We offer the paper.

Counsel for the Defendant objected, and the objection was sustained by the Court as to the report as an entirety, to which ruling of the Court, Counsel for Plaintiff excepted.

Mr. Cash: Then I read this other part: "Loans for account of correspondents, \$502,575.00".

Counsel for the Defendant objected, objection overruled, to which ruling Counsel for Defendant excepted.

Q. You handed me a report dated December 5, 1911?

A. Yes.

Mr. Cash: I offer that in the same way.

Counsel for defendant objected, and the objection was sustained to the report as an entirety, to which ruling of the Court, Counsel for Plaintiff excepted.

Mr. Cash: And of the same language, "Loans for account of correspondents made from their funds, \$396,250.00."

Counsel for the defendant objected, objection overruled, to which ruling Counsel for the Defendant excepted.

136 Q. Mr. Gutting, I want to ask you whether under a similar form to the Comptroller of the Currency you made report which included the Doyle loan and the Galbreath loan?

Counsel for the defendant objected, objection overruled, to which ruling Counsel for the Defendant excepted.

A. You mean copies of those, or a different form?

Q. No, the same form, but at a later time whether you made a report, whether your report to the Comptroller of the Currency included in the item which I have read here all call loans made for correspondents, the two loans the I. Doyle and the Galbreath that are now in controversy here?

Counsel for the Defendant objected, objection overruled, to which ruling Counsel for Defendant excepted.

A. All the loans made for correspondents were supposed to have been put in there. I didn't get up the figures. Our discount clerk gets up the figures. They are supposed to contain all the loans, so far as I know.

Q. If they were on your books then as outstanding call loans with the Okeana Bank, they would be included in that item when you made a report to the Comptroller of the Currency?

Counsel for defendant *objection*, objection overruled, to which ruling Counsel for Defendant excepted.

A. Yes.

Q. Now, Mr. Gutting I will ask you if there is not a well known

custom among banks of this city to make call loans for their correspondents?

Counsel for defendant objected.

137 A. Some banks do.

The Court: Do you mean to include in that National Banks or others?

Mr. Cash: I am only referring, of course to National banks, that is all we are dealing with.

The Court: Do you know what the custom is, Mr. Gutting?

A. Some banks do, some banks don't. Every bank has its own way of doing business.

Q. Have you ever been employed in any other bank except the Second National Bank?

A. No.

Q. I would ask you whether the Second National Bank has done that kind of business since you have been connected with it, so far as you know?

A. No, that practice was started in late years.

Q. When was it started?

Counsel for the defendant objected.

The Court: Do you propose to follow this up by proof of the other banks?

Mr. Cash: I can show it is the same thing in all the banks, if it becomes necessary.

The Court: On that statement you can answer, if the custom becomes pertinent in this case.

Counsel for the Defendant excepted to the ruling of the Court.

Q. When was it started?

138 A. I can't recall from memory when it was started, but I remember the time when banks did not take any loans for their correspondents. I can't recall just the date when it was started, the custom as I remember.

Q. Approximately. I don't expect you to give the date. About how many years?

A. I suppose about ten years, I suppose.

Q. For the last ten years the business has been done that way, so far as you know?

A. By some banks, yes. By some banks.

Q. In all the reports that you have seen, and that you have used in your experience there is this form for reporting the call loans?

A. In all the reports that have ever come to me as an official?

Q. In all that have ever come to you as an official, yes.

A. Yes.

Q. You have made out a good many of those reports, have you not?

Counsel for Defendant objected, and objection was sustained.

Q. How many reports have you made out as an official, would

you say, which you have sent to the Comptroller of the Currency of the bank's financial condition?

A. I think about five or six, I think you got about all of them here.

Q. And that is during what time?

139 A. 1911 and 1912.

Q. Have you ever been cashier of any other bank?

A. No, sir.

Q. Or an official of any other bank?

A. No, sir.

Q. Mr. Gutting, have you the stock register, or stock book of the Second National Bank?

A. I have got one of them here.

Q. Have you looked to see what became of the Certificates of the stock that were attached, I don't mean the actual certificates but what became of the stock, that were attached to the Galbreath loan and the Doyle loan, as shown by your books?

A. Yes, sir.

Q. What became of them?

A. Why, it was sold at the sale held by the stockholders of the Bank to sell the stock that the assessment had not been paid.

Q. Do you know what it sold for?

A. I can't tell you off-hand the exact figures, somewhere around \$5.00 or \$6.00 a share.

Q. Would your books show that?

A. Yes, sir.

Q. Can you turn to that without trouble and tell us exactly what it sold for? Tell us what book you refer to, Mr. Gutting, then you may give us the figures.

A. This was a journal gotten up specially for the purpose of this sale to keep a record of what the stock brought so as to be able to turn it over to the proper parties.

140 Q. Can you give us the figures accurately that you said you were not sure of a little bit ago?

A. Certificate No. 2131 sold for \$83.88, 11 share certificate.

A Juror: Is that much for each share?

A. No, no.

Q. The 11 shares?

A. \$83.88.

Q. For the 12 shares?

A. For the 12 shares \$84.00.

Q. What became of the money?

A. The money is still standing on the books of the Second National Bank awaiting the owner.

The Court: What was the date of this, Mr. Gutting?

A. August 22nd, 1912.

Q. Now, Mr. Gutting, have you the Minutes of the Board of Directors of the Second National Bank?

A. What date?

Q. 1911 and 1912.

A. I think so, yes.

Q. Are the Minutes kept in a book or loose leaf?

A. Loose leaf.

Q. I show you two papers there and ask you whether those are the Minutes of the days they purport to be?

A. Yes, sir, they are.

141 Q. That is of October 18, 1911, and May 29, 1911. I will have the stenographer mark them for identification.

The stenographer marked for identifica— the Minute- of April 18, 1911, Id. #37, pages 1 and 2 and the Minute- of May 29, 1911, was marked Id. #38.

Q. I show you another number of papers there purporting to be the Minutes of April 6th, isn't it?

A. Yes, sir.

Q. What are those papers? What are those papers that I show you, are they the Minutes of the corporation, if they are, of what date, what part of them, and where is the rest of them?

A. This is the Minutes of April 6th, 1911. I can't tell you what this is (indicating). Those are the minutes of April 6th, those two sheets (indicating), I can't tell what these are (indicating).

Mr. Cash: I will ask you to mark them for identification.

The stenographer marked the minutes of April 6th, 1911, for identification Id. #39, pages 1 and 2.

Q. What are these papers (indicating)?

A. The Minutes, these are 1912.

Q. What date?

A. February 23, 1912.

Q. Are they all there of that date?

A. They look as if they were all here.

Mr. Peck: I object unless you are sure of it.

142 A. I can't tell, if sheets have been taken out from between that. I can't tell a thing about it.

Mr. Peck: These are a lot of sheets and you can't tell which belong together. I am perfectly willing to trust to the witness if he will say which ones of these it is.

A. Those three sheets belong together. Whether there was other sheets taken out of that, I can't tell. It does not look as if there were.

Mr. Peck: Are you sure those three belong together?

A. Yes.

The stenographer marked the said sheets as Id. #40, pages 1 and 2.

Cross-examination.

By Mr. Peck:

Q. Mr. Gutting, when did E. E. Galbreath cease to be president of the Second National Bank of Cincinnati?

A. At the time the Clearing House Bank Presidents came is a directors.

Q. That was on the 14th day of April, 1912, wasn't it?

A. Yes, sir.

Q. The Board of Directors of the Second National Bank were then in office, all resigned, didn't they?

A. Yes, sir.

Q. The officers resigned, didn't they?

A. Yes, sir.

Q. You resigned at that time, didn't you?

A. Yes, but they didn't accept my resignation, but
143 resigned at that time.

Q. But the President's resignation was accepted?

A. Yes, sir.

Q. Then the Clearing House Association guaranteed—the Clearing House of Cincinnati guaranteed the depositors the security of their deposits?

A. They did, yes.

Q. The Clearing House Association is composed of all the banks of Cincinnati, generally speaking, isn't it?

A. All the large banks of the City.

Q. And that upon or about the 14th day of April they made this guarantee?

A. Yes, sir.

Q. Did they publicly announce that they guaranteed and stood back of the deposits of the Second National Bank?

A. They did.

Q. And at the time, at the same time, the Presidents of all the banks of Cincinnati, were elected on the Board of Directors, weren't they?

A. That was of the Clearing House Banks?

Q. Yes.

A. Yes, sir.

Q. Now, this was made after some examination of the assets of the bank and one thing or another?

A. Yes, sir.

Q. Who was elected President at that time, Mr. Laws?
144 A. Harry Laws.

Q. And he remained President of the Bank until after the assessment was levied and things straightened out again?

A. Yes, sir.

Q. A letter was received or an order from the Comptroller of the Currency to which you have referred and offered in evidence, dated April 15, 1912, received by your Board April 18, 1912, ordering the bank to levy an assessment upon each and every stockholder in the Bank. That is correct, isn't it, Mr. Gutting?

A. That is the letter we put on file a while ago.

Q. Was that made public, was that published at that time generally, that that assessment had been ordered?

A. I think it was, yes, sir.

Q. As soon as it was determined upon by the Comptroller is

Washington it was made known to the public, it was in the Cincinnati newspapers by dispatch from Washington, wasn't it?

A. I think it was, yes, sir.

Q. That the Comptroller had levied this 100 per cent assessment upon the stockholders of the Second National Bank?

A. Yes, sir.

Q. Now, then, after that how soon was the resolution, that is the assessment passed by the stockholders?

A. I can't recall that.

Q. The stockholders met to discuss whether they would levy the assessment or whether they would let the bank go into liquidation and be wound up, didn't they?

145 A. I think they did, yes sir.

Q. And thereafter the stockholders determined that they would not let the bank go into liquidation but would stand an assessment on it, didn't they?

A. Yes, sir.

Q. And thereupon in accordance with the resolution an assessment was levied, wasn't it?

A. Yes, sir.

Q. Do you remember the date of—that the assessment was levied, or can you refer to anything, can you refer to any books or papers here and give us the date when this assessment was levied? I have before me a paper marked, "Notice of Assessment. At a meeting of the Stockholders of the Second National Bank, July 6, 1912, the following resolution was passed: Resolved that under the provision of Section 5205 U. S. R. S. the deficiency in the capital stock of this Association amounting to \$1,000,000 be made good by assessment upon the shareholders pro rata upon the amount of capital stock held by each. The records show that you are the owner of — shares. Your assessment will be \$ —. This assessment is due at once and must be paid not later than July 18, at the Second National Bank, Cincinnati, Ohio. Harry L. Laws, President, Second National Bank, Cincinnati, Ohio." So that it was upon July 18, 1912, that this assessment was payable, that would be correct, wouldn't it?

A. I think it would, yes sir.

Q. It was upon July 6th, 1912, that resolution was passed by the stockholders to levy the assessment?

146 A. I wasn't at the stockholders' meeting, so I can't say.

Q. You would not dispute the date stated in this paper?

A. No, no. That is the paper that went out from the Bank idently.

Q. That is we can assume that the resolution of the stockholders levying the assessment when they determined that they would stand the assessment and that they would not quit, but would stand the assessment that was passed on July 6, 1912?

A. Yes, sir.

Q. Now, the order as we have seen was received, the order to either assess or wind up, was received from the Comptroller on April 15th, dated April 15th, 1912., wasn't it?

A. April 15 was the date of that.

Q. From April 15, 1912, to July 6, 1912, when this matter, the resolution was passed by the stockholders, nothing had been done in one way or the other about this assessment, had it?

A. No, sir.

Q. Now, Mr. Gutting, you say this stock sold 11 shares for \$83. and 12 shares for \$84.00 on August 22, 1912. This stock was selling upon the market during all this time, was it not, there were people buying and selling this stock from April 15, 1912, to August 22nd, 1912?

Counsel for the plaintiff objected; objection overruled, to which ruling Counsel for Plaintiff excepted.

A. I don't know.

147 Q. That is, you mean to say you don't know whether the stock was selling or not, or simply speaking of the price?

Counsel for plaintiff objected; objection overruled, to which ruling Counsel for Plaintiff excepted.

Q. Do I understand you to say that you don't know whether the stock was selling during this period of time, the stock of the Second National Bank?

Counsel for Plaintiff objected; objection overruled, to which ruling Counsel for Plaintiff excepted.

A. I can't recall whether it was or not.

Q. If you can't recall the fact as to whether the stock was selling during that period, I take it that you don't recall the price which it sold during that period?

A. No, sir, nothing except in the regular sale that was held by the stockholders that we have got a record of.

Q. This sale that was held at the bank by the stockholders, were these two certificates were sold, one for \$83.88 and the other for \$84.00, if I understand it right, that was the sale of the stock of the stockholders who did not pay their assessment?

A. Yes, sir.

Q. You didn't have the stock certificates themselves there to show them?

A. No, sir.

Q. But you just called off the number of the missing certificates which you should have with the number of shares and their rights?

148

A. Sold their rights.

Q. Of those who did not pay up their assessments?

A. That is correct.

Q. Anybody that was there would bid on them that wanted to?

A. Yes, sir.

Q. It was a public sale?

A. Public sale, it had been advertised?

Q. Advertised as such?

A. Yes, sir.

Q. Were the rights of other stockholders who had paid the assessment sold?

A. I did not hear that?

Q. Were the rights of other stockholders besides Mr. Galbreath sold at that time?

A. Oh, yes.

Q. I take it the assessment had not been paid by Mr. Galbreath upon his shares?

A. Had not been paid, no sir.

Q. Now, the price received for those rights was held for whoever might produce a certificate according as their interest might appear, wasn't it?

A. Yes, sir.

Q. That is anybody whose stock was sold out because they didn't pay the assessment could come in there and produce their certificate and draw their money?

149 A. Yes, sir.

Q. That is the way this \$83.88 was held?

A. Yes, sir.

Q. That is the way this \$84.00 was held?

A. Yes, sir.

Q. This whole thing was done on the order of the Comptroller of the Currency, was it?

A. Yes, sir.

Q. Do you remember Mr. Earnshaw's visit to the bank at or about the time of the failure, Mr. Gutting?

A. No, I do not.

Q. Do you recall the conversation with him?

A. No, I do not.

Q. Do you remember the day when he withdrew the certificates and the notes of I. Doyle and E. E. Galbreath, the certificates of stock of Mr. Galbreath that were attached as collateral from your bank?

A. April 15, I think it was.

Q. 1912?

A. Yes, sir.

Q. Does that so show on your books?

A. On our books, yes sir.

Q. The entry was made upon the books of the bank at that time?

A. Yes, sir.

Q. Is that book here in Court?

150 A. Yes, sir.

Q. Get it, will you please and refer to it.

Mr. Cash: I think that is admitted.

Mr. Peck: Well, I won't be sure that he is correct about it.

Q. What book is that?

A. This is the book in which we kept a record of loans that we had made for correspondents.

Q. What is this entry, all of this entry? (indicating).

A. "Returned to Mr. Earnshaw April 15, 1912."

Q. What was returned to him?

A. The loan with the collateral attached.

Q. Does the book show it?

A. It shows that it was returned, the book tells the fact of every loan, whether paid or returned, credited to the account—

Q. Read the entire column across there, all that you see on it.

A. Well, the column says, "Date, Our Rate, Broker, Maker, Collateral, Owner and Amount." But on this specific loan I would read, "December 9, 1911, Second National Bank, E. E. Galbreath, 11 shares of Second National Bank Stock, \$2,500 amount of loan."

Q. How about the I. Doyle loan?

A. The I. Doyle loan is January 5, 1912.—Second National Bank, I. Doyle, 12 shares of Second National Bank Stock, \$2,500. returned Mr. Earnshaw, April 15, 1912.

151 Q. Returned to Mr. Earnshaw April 15, 1912?

A. Yes, sir.

Q. Did the Second National Bank receive any of the money from either of these loans?

Counsel for Plaintiff objected.

The Court: By way of payment?

Q. Yes, or any other way, did the Second National Bank get any of this money?

Counsel for plaintiff objected; objection overruled, to which ruling Counsel for plaintiff excepted.

A. No, it did not.

Q. Who got the money?

A. I can't tell you that from this book here.

Q. From your own knowledge?

A. Mr. Galbreath got the money on the Galbreath loan. I don't know about the I. Doyle loan, whether I. Doyle got it or some broker.

Q. The I. Doyle loan was in fact, Mr. Galbreath's loan, wasn't it?

A. Yes, sir.

Q. And Mr. Galbreath in fact got the money on that loan also, did he not?

A. I don't know, I presume so.

Counsel for plaintiff objected.

Q. Now, can you state—you say some of these banks make
152 these loans for customers and some do not make a practice of so doing. Does that refer to the banks here in Cincinnati?

A. Yes, sir.

Q. Are there some National Banks in Cincinnati that do not make loans for customers?

A. Well, of course, I can't tell you anything except what the Second National Bank does, and what I hear other bankers talking about.

Q. As a matter of general and universal custom of—among banks and bankers, to your knowledge gained either in the talk and dis-

cussion among bankers or from any other way that you have knowledge on the subject of banking, would you say that that is a universal custom pertaining to all banks?

A. Not all banks, no sir.

Q. Now these loans which were made to Mr. E. E. Galbreath and I. Doyle in question in this case, were they laid before the Board of Directors or the Loan Committee of the Board of Directors of the Second National Bank?

Counsel for plaintiff objected; objection overruled, to which ruling Counsel for plaintiff excepted.

A. No sir, the Board of Directors had nothing to do with loans taken for correspondents.

The Court: In any case?

A. In any case.

Q. How was that handled, Mr. Gutting?

153 A. Well, the banker would write in to us, ask us to take certain amount of loans for them. As a rule we knew what his loaning limit was from our acquaintance with them, knowing what his capital and surplus was; and we would call up some broker and try to see if we could place these loans for him, ask them if they had any loans to offer us, and if they had we would take these loans and pay the broker for them, and charge it against the bank's account, write the bank the regular form of notice, which has been shown here in Court, and send it to them, and then file the loans in the safe for the benefit of the bank.

Q. Who would do that?

A. It might be the President, the Cashier, or the Assistant Cashier.

Q. In the case of this E. E. Galbreath loan, who did it?

A. I don't know. I can't tell you off-handed who did it.

Q. Who handled the matter in the case of the I. Doyle loan, do you know?

A. I think Mr. Telker, the Assistant Cashier handled it.

Q. Acting under Mr. Galbreath's directions?

A. I suppose so.

Q. Now, the Galbreath loan was handled by Mr. Galbreath himself, wasn't it?

A. By Mr. Galbreath, it had to be.

Mr. Cash: Did you say you knew that?

A. Oh yes, it had to be.

Mr. Cash: Did you know it?

Mr. Peck: Allow me to go ahead, Mr. Cash.

154 The Court: You have the right to object if it does not appear to be a fact of his own knowledge. Do you know, Mr. Gutting?

A. As far as the loan is concerned, I can't tell you. I don't think I ever saw the loan.

Q. That is you mean you didn't see it yourself?

A. That is it, I didn't see it myself.

Q. Of course, Mr. Galbreath had seen the note?

A. Yes, he had seen it. He couldn't help it.

Q. And the other had Mr. Galbreath's stock attached to it, and Mr. Galbreath's name was endorsed on the stock?

A. Yes, and Mr. Galbreath's authority to use the stock behind the loan, so Mr. Galbreath must have been doing some signing or writing to put the loan in.

Q. At this sale of the stock held on August 22nd, 1912, when these two lots were sold out for the prices which you have named, \$83.88 and \$84.00, what was the range of prices at that sale?

Counsel for plaintiff objected; objection overruled, to which ruling Counsel for Plaintiff excepted.

A. The stock sold anywhere from \$4.00 on up to \$17.00 a share.

Q. At the same sale?

A. At the same sale, yes sir.

Q. Was the average price above or below this \$6.00?

A. I think it was a little above that.

Counsel for plaintiff objected; objection overruled, to which ruling of the Court, Counsel for plaintiff excepted.

155 Q. It averaged \$9.00 a share, did it not?

A. I think that is it, I think it was \$9.00, around that figure it averaged a share.

At this point the Court adjourned until to-morrow morning, March 26th, 1915, at ten o'clock.

Morning Session, March 26th, 1915, at Ten O'Clock.

The witness, J. G. GUTTING, resumed the stand, and the cross-examination was continued as follows:

By Mr. Peck:

Mr. Gutting, have you made an investigation of the books as to the Doyle loans since we adjourned last night?

A. I was working on that just before I came up here, and I tried to find as much as I could of the records. I haven't got the note, and I am handicapped in hunting up the record on the strength of that. We can trace the things better if we have the paper itself, and find out what the papers were.

Q. Have you finished what we wanted?

A. Not on that one particular note, no sir. We didn't get through on that.

Q. I won't ask anything further about that at this time. Mr. Gutting you can compare this copy Exhibit #34?

A. This helps me right now.

Q. If you will do that, you can come back for further cross-examination?

A. Yes, sir.

156 Q. Mr. Gutting, did you purchase any of the stock of the Second National Bank in the year 1911?

A. Yes, sir.

Counsel for Plaintiff objected and moved that the preceding answer be stricken out; objection and motion overruled, to which ruling of the Court, Counsel for Plaintiff excepted.

Q. I mean individually?

A. On May 2nd.

Q. When did you purchase stock?

A. On May 2nd, 1911.

Q. What did you pay for it?

Counsel for Plaintiff objected.

A. \$242.00.

Counsel for Plaintiff moved to strike out the preceding answer.

The Court: You are not asking the question on the question of the market, but on the question of good faith?

Mr. Peck: No, we will show the market later.

Mr. Cash: Mr. Gutting was not an officer of the bank at that time. Mr. Williams did not resign until some time in April, 1911. He was cashier in January, 1911. Therefore, he was not an officer, as he said, but succeeded Mr. Williams as Cashier. It does not appear when he became a director of the bank. It does not appear he had knowledge of this letter.

The Court: This witness became a cashier in January, 1911, if I am correct, was that right?

157 A. Yes.

Mr. Cash: But director when?

A. I think in October of 1911, and cashier in January.

The motion of the plaintiff was overruled, to which ruling of the Court, Counsel for Plaintiff excepted.

Q. How many shares did you buy then, Mr. Gutting?

A. Fifteen shares.

Q. What did you pay for that stock per share?

A. \$242.50.

Q. Per share?

A. Per share.

Q. Mr. Gutting, did you buy any of the stock after that?

A. No.

Q. Do you know whether Mr. Gallbreath bought any of the stock after that?

Counsel for plaintiff objected, objection overruled, to which ruling Counsel for Plaintiff excused.

The Court: If this is your own knowledge, not hearsay.

A. Mr. Gallbreath and I bought 65 shares of stock, he took 50 shares and I took 15. I was a little sore because they would not give me more at that time.

Q. He got 50 and you got 15?

A. Yes, sir.

Q. When was this?

A. That was May 2, 1911.

158 Q. And the whole purchase made at this price for \$242.00?

A. Yes sir, \$242.50.

Q. After that, did you purchase any more?

A. No, sir.

Q. Did Mr. Galbreath buy any more after that? Do you know.

Counsel for Plaintiff objected, objection overruled, to which ruling Counsel for Plaintiff excepted.

A. Yes, sir.

A Juror: That is per share, I understand?

Mr. Peck: Yes sir, \$242.50 per share.

Q. When did Mr. Galbreath purchase after that, Mr. Gutting?

A. I can't give you the exact date off-handed, but our records will show.

Q. Can you supply the exact date?

Counsel for Plaintiff objected.

Q. Do you remember, yourself? I withdraw that question and ask the question on the voir dire: Do you remember yourself the fact of the purchase?

A. I remember positively that he purchased stock, but I can't remember and give you the exact date when it was.

Q. Well, now, can you furnish us approximately the date?

A. Oh, I think it was somewhere in February, 1912, I think.

Q. Was you aware, Mr. Gutting, what he paid for that stock?

159 Counsel for Plaintiff objected, objection overruled, to which ruling Counsel for Plaintiff excepted.

A. Yes, sir.

Mr. Cash: Of your own knowledge?

A. Yes, sir.

Q. What did he pay for it?

A. \$200.00 a share.

Q. In February, 1912?

A. Well, I am giving you approximately the date. I can't tell from memory exactly what it was.

Q. After that did Mr. Galbreath buy any more?

A. Not that I know of.

Q. Did any of the other officers of the bank purchase any of the stock on or about that time, if you know?

Counsel for Plaintiff objected, objection overruled, to which ruling Counsel for Plaintiff excepted.

A. Not that I know of.

Q. On the back of these reports that you made to the Comptroller of the Currency, among the miscellaneous information, where this information concerning loans for the account of correspondents

made from their funds is included, I notice a blank for loans and discounts secured by real estate mortgages or other liens on realty. I call your attention to that. I see a blank form left for loans and discounts secured by real estate mortgages or other liens on realty, name of borrower, form of collateral, amount carried on books, amount of prior lien, what property, if any, etc. This is all there, isn't it, Mr. Gutting?

A. All there, yes sir.

Q. You were aware that it was contrary to the rules of the department, contrary to the law for you to have any loans on real estate, weren't you?

Counsel for Plaintiff objected, and objection sustained.

Q. You, however, reported no real estate loans, did you?

A. I don't recall what we reported.

Q. Well, look and see whether you reported any real estate loans,—this is the report of January, 1911.

A. No, this is March, 1911—March 7, of 1911, there was no real estate loans.

Q. The same thing appeared on the back of these forms that the Comptroller sent out, didn't they?

A. Yes, sir.

Q. Did you charge the Okeana National Bank for the collection of their checks??

A. No, sir.

Q. I have reference to checks on other City banks that would come into the possession of the Okeana bank, which would be necessary to be collected?

A. No sir, we collected their stuff free of charge for them.

Q. Was that usual for out-of-town depositors?

A. Well, it depended entirely on the nature of the account, entirely; some banks we charge and others we do not.

161 Redirect examination.

By Mr. Cash:

Q. What bank accounts do you charge and what don't you, what does that depend on?

A. That depends in the first place upon the balance that they carry: in the second place whether their reserve is such that we can.

Q. You don't make any charge for that service for the Okeana Bank?

A. No, sir.

Q. Now, these other reports that I had you identify yesterday, in 1911, they all contained those same blanks that have been referred to by Mr. Peck, didn't they?

A. Yes, sir.

Q. Did you refer to any real estate loans on any of them?

A. I can't tell you without looking at them.

Q. Did you have any real estate loans?

A. I don't think we did, but I can't say positively, but I don't think we did.

Q. Did you report them if you had any?

A. You bet we did.

Q. And where are those reports. Let me have them again. Take them in order. The one of January that I called your attention to yesterday. Tell us whether there is any report of any real estate loan in that?

A. I can't find the January one.

162 Q. If you can't find the January one, take up the next one.

A. All right, the March report of 1911, none.

Q. Take the next one?

A. June, 1911, none. September, 1911, none. December, 1911, none.

Q. And those are the four.

A. Yes, sir.

Q. There is one still missing you can't find there?

A. Yes, sir.

Q. Mr. Gutting, I want to show you a letter of March 4, 1911 which we have had identified, from the Comptroller of the Currency and ask you whether you knew of that at the time you purchased the stock, as you say?

A. No, sir.

Q. You did not?

A. No.

Q. Then you were not a member of the Board of Directors of the Second National Bank at the time that you purchased this stock were you?

A. No.

Q. I show you a paper which has been offered in evidence and marked Exhibit #33, dated February 1st, 1912, and ask you whether that is in your handwriting, a statement made by the Second National Bank to the Okeana Bank?

A. No, sir.

163 Q. Whose handwriting is that?

A. I think it is the Discount Clerk's.

Q. Was that gotten up under your supervision?

A. I can't recall that.

Q. You were cashier at the time, were you not?

A. Yes, sir.

Q. This as you said yesterday shows the interest, the quarterly interest, I guess it is, paid on the Doyle loan and on the Galbreath loan that are in controversy here?

A. It shows the interest paid on E. E. Galbreath \$2500.00 loan and interest on I. Doyle \$2500.00 loan and credited to their account.

Q. It shows one of J. G. Gutting, who is that?

A. That is the party sitting here.

Q. That is you?

A. Yes, sir.

Q. Was that your loan?

A. Yes, sir.

Q. Or is it Mr. Galbreath's?

A. No sir, that was my loan.

Q. What was it secured by?

A. United States Lithograph Stock.

Q. Was that in that book you had here yesterday?

A. Suppose you turn to that item. What book are you referring to now?

164 A. Record book of loans from Country Correspondents.

Q. Where is this loan (indicating)?

A. Right here (indicating).

Q. What is the date?

A. December 19, 1911.

Q. Fifty shares United States Lithograph Preferred?

A. And 50 United States Lithograph Common.

Q. Was that your stock?

A. Yes, sir.

Q. On the books of the Lithograph Company in your name?

A. Yes, sir.

Q. Paid for value?

A. Yes, sir.

Q. Didn't you make loans from time to time to accommodate Mr. Galbreath, too?

A. Didn't I make loans to accommodate him?

Q. Yes, didn't you sign notes like I. Doyle signed a note?

A. I think not.

Q. Never?

A. I wouldn't say positive, but I have no recollection of having signed any for him.

Q. Who was I. Doyle?

A. A stenographer of his.

Q. A stenographer in your office over there?

A. Yes, sir.

Q. How long before, when did she leave the Second
165 National Bank, do you know?

A. I can't give you the exact date, I think about, oh, I can't give you the date at all.

Q. Mr. Gutting, on yesterday I called your attention to this loan on this very paper, didn't I?

A. Possibly you did, I think you did.

Q. Didn't you tell me that was Mr. Galbreath's?

A. Mr. Galbreath's loan, I think it is. Yes sir, I think it is.

Q. It is Mr. Galbreath's loan?

A. I think so, yes sir.

Mr. Peek: Which loan do you refer to now, Mr. Cash?

Q. I am not asking about the I. Doyle, I am asking about the one that appears in your name?

A. Oh no, no, I never said that that was Mr. Galbreath's loan, no sir.

Q. You misunderstand me. You do remember I asked you, don't you?

A. Whether the I. Doyle loan, not my loan. The I. Doyle loan is what you asked me yesterday, if my memory does not fail me.

Q. Did the officers of the bank know that you borrowed that money?

A. I don't suppose they did.

Q. The entire office force were in the habit of doing things just that way, weren't they?

A. No, I don't think the entire force.

166 Q. I mean cashiers and assistant cashiers?

A. Borrowed money, you mean?

Q. Yes, vice-president and president?

A. From time to time if they needed money, they borrowed.

Q. Did you borrow any money that you could put up the Second National Bank Stock as collateral?

A. Yes, sir.

Q. Where did you borrow that?

A. Oh, different places.

Q. Was that for your own purposes or for somebody else?

A. For my own purposes.

Q. Didn't you borrow some for Mr. Galbreath?

A. No, sir, not that I know of, not that I can recall.

Q. Not that you can recall?

A. No, sir.

Q. I would like you to state whether you did or whether you did not?

A. I did state, I don't recall having borrowed any for Mr. Galbreath.

Q. How did you know that this I. Doyle loan was for the benefit of Mr. Galbreath?

A. Well, I have been trying to trace up our records. It seems to me that from the records that appears as though it were his loan—that is how I know. I did not know it at the time.

167 Q. Where was the loan before the Okeana Bank got it?

A. That is what I am trying to work on now.

Q. Your books show that?

A. I think it will, that is what we are working at—what Mr. Peck—

Q. Do you know that that loan was in the Monroe Bank, and was called—

A. That is exactly what we are working on now.

Q. There was \$500.00 paid on it which shows on the books there?

A. That is exactly what we are working on.

Q. Where does the \$500.00, does this \$500.00 come from?

A. I can't tell you. That is what I am trying to work out for you.

Q. It was reduced to \$2500.00, then it was turned over to the Okeana Bank, is that right?

A. I can't tell you—

Counsel for defendant objected, objection overruled.

A. (continued) I can't tell you. I don't know from knowledge.

Q. Where is that paper I gave of the Doyle loan—this note was originally dated the 31st day of January, 1908, and was then for \$12,500.00, wasn't it?

A. Yes, sir.

The Court: Which note do you refer to?

Q. The Doyle note.

A. That is, according to that copy there. Your book ought
168 to show whether that is so or not?

A. No, that note may never have been in our bank at all. I can't tell you that. What we call a broker's loan, it may have been in every broker's shop in Cincinnati for all I know.

Q. The money may have been originally borrowed by Mr. Galbreath or somebody else, and that wouldn't appear on your books?

A. That is right.

Q. It does appear on your books somewhere, doesn't it?

A. You mean this note here?

Q. Yes.

A. We find here I. Doyle note for \$2500.00, but I don't know whether that is the piece of paper.

Q. You don't know it was that one. What is the date that it appears on your books as having been turned over to the Okeana bank?

A. January 5, 1912.

Q. January 5, 1912. Now, if you had that, or if that went through your Bank in any transaction with the Okeana Bank, it would show something about that, too, wouldn't it?

A. Yes, sir. We will find all that.

Q. See if you can find it.

A. Yes, sir.

Q. Have you any book here that you can give us the information?

A. I don't think I have as yet. That is what I am working on
now.

Q. How long would that take you?

169 A. Well, I can't tell you. I may succeed in ten minutes, and it may take two hours.

Q. Well, if this was in the Monroe Bank, and was a call loan having been made by your bank, the Second National Bank, for the Monroe Bank, that would show on your books, wouldn't it?

A. Yes, sir.

Q. It would show when that note was called?

A. Yes, sir.

Q. And it would show what became of it, wouldn't it?

A. Yes, sir.

Q. But you can't tell us those facts without looking at your records?

A. No, I would have had that information this morning if I had had that note.

Q. Where on your books does it show, if at all, that there was \$500.00 paid on this note on January 5, 1912?

A. If there has been a payment made on any note, it would show in the Cash Register of the Discount Clerk, any payment on any note.

Q. Does it show who the payer was?

A. It should show who he was.

Q. Have you looked at it?

A. Not as yet. I have looked at the Cash Register, I haven't satisfied myself yet as to everything.

Q. As to who paid it or not, you say, you have not satisfied yourself?

170 A. I haven't satisfied myself as yet what became of that note, no sir.

Q. Have you any personal knowledge of this note being in the Monroe Bank just prior to your turning it over to the Okeana Bank?

A. I have no personal recollection, no sir.

Q. Have you any correspondence with the Monroe Bank in reference to it when it came into your hands?

A. That may have been, I can't tell, though, no recollection of it.

Q. You can't remember those things?

A. No, sir.

Q. While you have got that book in your hand, Mr. Gutting—what do you call that book?

A. This is a record of the Country Bank loans?

Q. Does that show all the country bank loans that were made during the period that it covers by the Second National Bank?

A. Yes, sir.

Q. Or through the Second National Bank at that time?

A. Yes, sir.

Q. And gives the details of them?

A. Yes sir, as far as you see here, as far as I have shown on this page, yes sir.

Q. And that book was regularly kept in the bank during
171 the whole of 1911, wasn't it?

A. Yes, sir.

Q. And it is kept still?

A. Well, I think we have got a new one similar to this.

Q. In which you keep loans that are made for banks of that kind?

A. Yes, sir.

Q. You are doing the same kind of business now, aren't you?

A. Yes, sir.

Counsel for defendant objected and moved to strike out the preceding answer, objection and motion overruled, to which ruling counsel for defendant excepted.

Q. Now, that you say is one of the regularly kept books of the bank and is in the bank and kept there?

A. Yes, sir.

Q. Any particular individual keep that book?

A. Yes, sir.

Q. Who is that?

A. The Discount Clerk.

Q. During 1911 the Bank Examiner came—was that book there for his inspection?

A. Yes, sir.

Q. Did he check it up?

172 A. I think not.

Q. You think he did not?

A. No, sir.

Q. You don't think he ever made any effort to see what these loans were, or the amount of them, or anything?

A. I didn't say that.

Q. What did the Bank Examiner do when he came around?

A. Probably never looked at the book.

Q. You say probably. You don't know whether he did?

A. I can't tell you everything that the Bank Examiner did when he was in the bank here. I don't know. I didn't follow him around.

Q. He is supposed to examine all the books, isn't he?

A. No.

Q. That book was there for his examination if he wanted to examine it?

A. If the Examiner made an examination of the bank loans, why he would probably have taken the loan itself. He would probably have disregarded the book entirely.

Q. What is there outside of this book that would show what loans you made for the outside correspondents?

A. Nothing except this book and the loan itself.

Q. And the loan itself?

A. Yes.

Q. The only way to check up the one with the other would be to compare the papers as you have them in the bank with the books, wouldn't it?

73 A. No, a bank examiner would go—would correspond with the bank for his comparisons. He wouldn't depend on his word, on our record and the other party's record, or our notes and the other party's record to agree. He wouldn't care for our books on bank loans.

Q. What he would get then is what loans you had, then compare them with the bank itself?

A. Yes, sir, with the bank.

Q. Taking the example of the Okeana Bank, if he wanted to find out about what loans you had for them, he would take their loans and our loans shown in your books, or the papers in your bank, and compare them with the other record?

A. That is what he should do.

Q. That is what they do?

A. Yes, sir.

Q. You never made any effort to conceal that book from the examiner, did you?

A. Absolutely no.

Q. Or from any one else?

A. No, sir.

Mr. Cash: I want to offer this letter which has been heretofore offered and marked Id. #35.

Counsel for defendant objected, objection overruled, to which counsel for defendant excepted.

174 The said letter was admitted in evidence, and is attached hereto as part hereof marked Ex. # 35.

Q. Now, Mr. Gutting, this letter speaks of two examinations in particular that were made in January and February preceding this letter. Who was the bank examiner, if you know, that made those examinations?

A. I can't recall.

Q. Who was the bank examiner in this district at that time?

A. I can't say that. Mr. McCune was bank examiner followed by Mr. De Camp, but just what date each fellow served I can't tell you now.

Q. Don't you know as a matter of fact that Mr. McCune made these two examinations referred to?

A. I should judge that he did. That is about his time when he was examined I think. Just when Mr. DeCamp succeeded him I don't recall.

Q. Did you see Mr. McCune in the bank about these times?

A. If he was there?

Q. January and February, 1911?

A. If he was there, I probably saw him.

Q. Don't you know that Mr. DeCamp did not succeed him until way late in the year of 1911?

A. Well, in my memory I haven't got the dates Mr. DeCamp succeeded Mr. McCune.

Counsel for defendant objected to the leading character of the questions.

175 Q. I will ask you what is your best impression, now, as to who made those examinations that are referred to in this letter?

A. I think those examinations were made by Mr. Sam McCune at that time I think he was the examiner.

Q. Did Mr. McCune, the man to whom you have referred, have any official position in April of 1912 with the Second National Bank?

Counsel for defendant objected.

Mr. Cash: It is only a question of identity for the present. I want to show that he was vice-president of the bank afterwards.

Objection overruled, to which counsel for defendant excepted.

Q. Whether it is the same man?

A. Mr. McCune became vice-president of the bank when the Clearing House presidents went in as directors whatever that date was, in April sometime, I don't know when.

Q. Was that before or after this letter of the Comptroller, the last letter of the Comptroller ordering the assessment?

A. What was the date of that letter?

Q. April 15th I think it was.

A. I can't tell you. It was around that time that Mr. McCune came in.

Q. At the time the Clearing House directors took charge?

A. Yes, sir.

Q. I want to ask you, Mr. Gutting, to state to the jury, if you can, what was the date of the last report that you made to
176 the Comptroller of the Currency and which you published in the paper prior to the Clearing House directors taking charge of the bank?

Counsel for defendant objected, objection overruled, to which counsel for defendant excepted.

A. I can't tell without seeing the reports.

(The reports were handed to the witness.)

The Court: You are asking the date?

Mr. Cash: That is all.

A. February 20, 1912.

Recross-examination.

By Mr. Peck:

Q. I call your attention to this letter from T. P. Kane, Deputy Comptroller. The first item I see here is direct loans to The Ford & Johnson Co., \$171,500, bills of sale of furniture amounting to \$85,000 held as collateral. What is the meaning of that "held as collateral?"

A. Why, part of those loans were secured by furniture which we had purchased from the Ford & Johnson Co.

Q. That was by loan on their stock of goods?

A. Yes. That was a bill of sale made out to us so that they couldn't sell it to anybody else.

Q. Here is a loan for \$36,000 to the Helena Manufacturing Co. and the U. S. Rattan Co. Do you know what became of that loan?

A. I think that the Helena Manufacturing Company,
177 about 50% I think or 60% of their obligation is paid. I don't recall the other. I can't remember that.

Counsel for plaintiff objected to the preceding question and moved that the preceding answer be stricken out upon the ground that the statement of the witness is not the best evidence of the condition of the loan but that the books of the bank are the best evidence, and upon the ground that it is a matter of affirmative defense and not proper cross examination.

The said objection was overruled, to which counsel for plaintiff excepted.

Q. When was this sixty per cent paid on the paper of the Helena Manufacturing Company—when was this paper of the Helena Manufacturing Co. paid, Mr. Gutting?—the sixty per cent of that, if you remember?

A. I can't give you the date on it.

Q. Now, the next item which I see here is N. S. Keith, accommodation notes, interest paid by the F. & J. Company. Do you know what became of that?

A. They were taken up.

Q. They paid that, did they?

A. Yes, sir.

Q. Fifty thousand dollars?

A. Yes, sir.

Q. Now, the next item I see is G. B. Cox, C. H. Davis, \$25,000. Was that paid?

A. Yes, sir.

178 Q. The next item I see is N. S. Keith, G. R. Cox, \$7,500. Was that paid?

A. Yes sir, that was paid.

Q. The next item is Central Storage & Warehouse Company, interest by the Ford & Johnson Company, \$100,000. What became of that?

A. That was paid.

Counsel for plaintiff objected upon the ground that the actual date of payments should be given, and that the testimony is incompetent as to said payments because the same may have been made after April 15, 1912.

The said objection was overruled, to which counsel for plaintiff excepted.

Mr. Cash: I reserve an exception to this line of examination on every ground I have indicated.

The Court: That will be understood.

Q. The next one I see here is G. V. Cutter, accommodation note \$95,000. That was a note which was signed by—all of the directors of the Second National Bank signed a note and took that note up, did they not? That was with the Mercantile National Bank of New York, was it not?

A. Yes sir, with the Mercantile National Bank of New York.

Q. And the directors of the Second National Bank all signed a note individually and took up the obligation of the bank, did they not?

A. They guaranteed it.

179 Q. And that note has since been settled by a settlement with the directors and the Mercantile Bank of New York?

A. Yes.

Counsel for plaintiff objected upon the ground that it is no proper cross-examination.

The Court: Are you asking whether the original obligation was paid or not?

Mr. Peck: Yes, the original obligation was paid by substituting personal obligation of the directors to the Mercantile National Bank of New York, which was afterwards satisfied.

The Court: What bearing has that upon the issue of good faith

Mr. Peck: So far as the Second National Bank is concerned, that was entirely extinguished long before the transaction in this case happened. This was not a liability of the Second National Bank. The Second National Bank had nothing to do with it at the time of the transaction with the Okeana Bank.

The Court: Well, find that out.

Counsel for plaintiff moved that the preceding question and answer be stricken out.

Mr. Moulinier: Mr. Peck is not testifying.

The Court: The jury understands that Mr. Peck's statements to the court are not evidence. Objection overruled.

To which ruling of the court counsel for plaintiff excepted.

Mr. Peck: I would like to have your Honor, if your Honor will, explain to the jury the difference between my statement to the court and my questions to the witness.

180 The Court: I attempted to do that, Mr. Peck.

Mr. Peck: Well, I will have to take an exception to that ruling of the Court.

The Court: What is your point?

Mr. Peck: Well, I stated to the witness and asked him if it is not true that the Second National Bank obligation on the \$95,000 was taken up by the guaranty of that obligation individually by the directors and I understand that Mr. Gutting has answered yes.

The Court: That is all the jury have. The rest that follows is out of the case, that is, your statement following that is not in evidence.

Q. Let me put my question, if we can start new, so I can understand it and so the jury can get it. Mr. Gutting, is it not true that the \$95,000 note referred to was a note of G. V. Cutter in the Mercantile National Bank of New York, and is it not true that prior to the time of these transactions with the Okeana National Bank, the First National Bank of Okeana, that the directors of the Second National Bank substituted their individual guaranty of Mr. Cutter's loan for the guaranty of the Second National Bank?

Counsel for plaintiff objected.

The Court: I will allow the witness to answer that question with the understanding that he state what was done, what became of that particular transaction?

To which ruling of the court counsel for plaintiff excepted.

181 A. There was a guaranty of the Cutter note in the Mercantile National Bank of \$95,000.00 which had not been acted upon by the Board of Directors of the Second National Bank, but had been signed by an official of that institution. That guaranty was taken up by a guaranty given by the directors of the Second National Bank and the case was afterwards settled.

The Court: What do you mean by guaranty, Mr. Cutting? What was the original paper and what was the final paper?

A. One paper merely said that the—

The Court: What was the first? What do you call a guaranty?

A. The first one was signed by an officer of the bank and stated——

The Court: What bank?

A. Of the Second National, stated they would guarantee the Ford & Johnson Company would pay; in other words, that Cutter's note would be paid.

Mr. Cash: The Court wants to know what the Cutter note was first?

A. \$95,000, the Ford & Johnson Company.

The Court: That was guaranteed by an individual officer of the Second National Bank.

A. Yes, sir.

Q. By the bank, by an officer on behalf of the bank?

A. By an officer of the Second National Bank?

The Court: By him as an individual?

182 A. No, in his official capacity.

The Court: Who was that individual?

A. That was the president, C. H. Davis, President.

The Court: What became of that particular piece of paper?

A. That guaranty was taken up by the directors giving their personal guaranty in place of it.

The Court: In what form?

A. Same form exactly. When the note came due instead of its being guaranteed by this president, the directors individually guaranteed the note.

The Court: They all endorsed it?

A. They all guaranteed on a separate piece of paper that the note would be paid.

Q. The Mercantile Bank of New York then surrendered the right which it had to charge that note at maturity to the Second National Bank, did it not?

A. They did, yes, sir.

Q. And that extinguished the \$95,000 item which is on this list did it not?

A. Yes, sir.

Counsel for plaintiff objected, and objection sustained.

Q. Well, that was the outcome of the \$95,000 so far as the Second National Bank was concerned?

A. Yes, sir.

Q. The Mercantile National Bank of New York released
183 the Second National Bank on the \$95,000, didn't it?

Counsel for plaintiff objected, and objection sustained.

Q. Well, they wrote a letter to the Second National Bank in which they said they surrendered the right which they had to hold the \$95,000 note against the Second National Bank, did they not?

Counsel for plaintiff objected, and the objection was sustained, to which counsel for defendant excepted and avowed *th* that, if the witness were permitted to answer, he would say that such letter was received from the Mercantile National Bank of New York.

Q. Now, is it not a fact that the Mercantile National Bank returned at that time, to the Second National Bank the \$95,000 guaranty which Mr. Davis had signed and sent to the Mercantile National Bank?

Counsel for plaintiff objected, objection overruled, to which counsel for plaintiff excepted.

A. Yes, sir, the guaranty was returned to the Second National Bank.

Q. Now, that is this \$95,000 item marked G. V. Cutter, accommodation note?

A. Yes, sir.

Q. Now, I notice this letter read here, "The following loans are extremely doubtful and must be charged off at the time of the next examination if still in the bank." I notice one German Russell Co., \$4792.19. Do you know what became of that?

184 A. Why, they turned over a leasehold in a building to us that they had. We collected part of that and part of it we did not collect.

Q. I notice note of the Roberts Manufacturing Co., \$600. Do you know what became of that?

A. I don't recall that.

Q. The Smith-Patterson Company, \$808.00. Do you know what became of that?

A. No, I don't recall the small items.

Q. W. E. and Ella M. Smith. Do you recall that?

A. They made several payments. Whether they paid it all I can't say positively.

Q. Now, A. E. Hutson, \$4,095.86. Do you recall that one?

A. No, I don't recall it.

Q. R. L. Dollings, C. B. Richards, D. A. Trapp, \$2,075.00. Do you recall that?

A. That is paid down to \$300.00. They are paying on it, and each time the note falls due they make a payment and renew it for the balance.

Q. Hudson Produce & Feed Co., \$2,100. Do you recall that?

A. I think we got a piece of real estate from them up at Huntington, W. Va., that we sold afterwards, and I think it was \$1,900 or \$2,000 that the real estate brought.

Q. C. W. Stewart, \$6,375.50. Do you recall that one?

A. No, I don't recall that.

Q. William E. Spink, \$10,000. Do you recall that one loan?

185 A. No, I don't recall that.

Q. Geo. T. Brannan, \$14,987.00. Do you recall that one?

A. No, I am not positive about it.

Q. E. C. Schulte Co., \$3,642.94. Do you recall that one, what the outcome of it was?

A. No, I don't recall that.

Q. Nick Rubel, do you recall that?

A. Nick Rubel, \$2,000, was paid.

Q. J. H. Dickey, \$6,875.00?

A. I think that was charged off.

Q. Claude Ashbrook, \$9,850.00.

A. That was paid.

Q. W. C. Wharton, \$3,500. Do you recall that one?

A. Paid in full with interest.

Q. Now, the Farmers Bank of Cane Valley, Kentucky, Receivership, \$9,925.00.

A. That was paid.

Q. Now, the Wiborg-Hanna Co. Receivership, \$38,198.13. Do you recall that?

A. Yes, sir, the Wiborg-Hanna Co. have been paying us interest at the rate of six per cent, have been paying down on the loan and we consider it good.

The Court: How much has been paid?

A. They have paid the loan down to about \$20,000, and paying interest right along.

Mr. Forcheimer: Which you mean, \$20,000 has been paid?

186 A. No, down to about twenty—no, it is below that now.

We got a dividend the other day again, it is between fourteen and fifteen thousand dollars now.

Q. It was \$38,198.13?

A. Yes, sir.

Q. The Enterprise Lumber Company. Do you know about that?

A. We got four per cent bonds for that, and the first of those bonds fell due sometime this year, of the Enterprise Lumber Co.

Q. Are they mortgage bonds?

A. Yes, sir.

Q. H. C. Yergason, \$3,400. Do you recall what became of that loan?

A. We are still carrying part of that loan, I think about \$2,000 of it, and it has got collateral back of it.

Q. The American Publishing Company. What became of that loan? If you remember?

A. I don't remember that.

Q. The T. H. Talbott loan, do you recall that? \$2,000.00?

A. That is one we had two bonds back of that, and the balance was charged off. I think the bonds were worth about \$1,000.

Q. On that loan there would be a loss of about \$1,000?

A. Yes.

Q. Five notes discounted for C. L. Hills, amounting to \$600. Explain about this.

A. Hills went into the hands of a receiver, and I think we got twenty-five cents on the dollar on those.

187 Q. The Diebold Loan & Building Company Receivership, \$2,500. Do you recall that?

A. Yes, sir. There was a dispute that came up afterwards with the Diebold Loan & Building regarding certain checks that were paid by the bank on which they claimed that the endorsement had been a forgery, and we agreed to release them on that \$2,500 provided that they would not bring suit on the notes that they claimed were a forgery,—on the checks which they claimed were forgeries.

Q. The J. G. Campbell loan, \$3,125.89.

A. I don't recall that. I think that was not paid.

Q. The Ohio River and Columbus Railway Company.

A. The Ohio River & Columbus Railway Company, \$110,000, together with C. H. Huttig, and G. W. Galbreath \$50,000 loan, were both guaranteed by Mr. C. H. Huttig and we considered it one of the best loans in the bank, and it was paid with interest. Mr. Huttig was one of the wealthiest men in St. Louis, one of the wealthiest men in St. Louis.

Q. Was that his condition at the time this criticism by this deputy, T. P. Kane, was made?

A. Yes sir, and afterwards he became president of the American Bankers Association.

Q. Now, here is a loan through extended lines, W. E. Hutton & Co., \$165,000. What about that?

A. Hutton has paid us.

Q. That was paid, was it?

188 A. Yes, sir.

Q. The Metropolitan Bank & Trust Co. of Cincinnati, \$128,000. What of that?

A. The Metropolitan loans were secured by their accounts receivable, and after the Metropolitan went into the hands of a receiver, why, he was glad to take up the loans to get his accounts back.

Q. Was this paid?

A. Yes, sir.

Q. In full?

A. Yes, sir.

Q. For \$128,000?

A. Yes, sir.

Q. Here is the Ohio River & Columbus Railway Co., this item is included in the list of slow loans mentioned above. That is the same note that you spoke of that they had the gentleman from St. Louis on?

A. That is the one.

Q. There is a list of items concerning the Guaranty Bank & Trust Co. of Birmingham, and the City Bank & Trust Co. of Birmingham, the Alabama Savings & Trust Co., paper taken from the Alabama Savings Bank & Trust Co. Can you state what became of that?

A. There is a suit pending between us and the Alabama Trust and Savings about a legal point. I don't know what they are.

189 The Court: Are they paid or not?

A. No, they are not paid.

Q. It is in litigation, is it not?

A. Yes sir, different suits pending between us.

Q. In this Alabama Trust Co. matter, if the liabilities should be established in that suit, that is your right to recover, do you know whether or not the concerns are good?

A. No.

Q. Mr. Gutting, you say that in May of 1911 when you purchased your stock at \$242 a share you were not aware of the existence of this letter?

A. No, but that wouldn't have stopped me from buying it.

Counsel for plaintiff objected and moved that the preceding answer be stricken out, and the motion was sustained.

Q. Were you at that time aware of the existence——

Mr. Cash: I withdraw that objection.

Q. Were you at that time aware of the existence of these loans that are listed in this letter?

A. If you mean that I have knowledge in my mind of them, no, but I was familiar generally speaking with the loans of the bank, yes.

Q. Did you at that time know of these large items listed here as Ford & Johnson Company loans?

A. Yes, sir.

Q. Did you know at that time about the \$95,000 in the Mercantile National Bank of New York, the G. V. Cutter loan?

190 A. Yes, sir.

Q. Is there anything contained in this letter of the examiner that has been read to you generally speaking of which you were not aware at the time you purchased your stock?

A. Not that I can recall.

Mr. Cash: That is, you are aware of all——

Mr. Peck: Wait a minute, Mr. Cash——

A Juror: I would like to ask a question, your Honor. Did you pay the assessment on your stock?

A. No, sir.

A Juror: Would your Honor allow that answer to stand?

The Court: Which one?

A Juror: The answer Mr. Cash objected to and withdrew the objection, that Mr. Gutting made in regard to the letter.

The Court: Do I understand that he answered it?

Mr. Cash: He answered it and I withdrew it.

Q. I will ask it again. Would it have made a difference to you in the purchase of your stock had you seen this letter, Mr. Cutting?

A. No, sir.

Q. You have been asked by one of the jurors whether or not you paid your assessment, and you said no. Why did you not pay your assessment?

191 Counsel for plaintiff objected.

The Court: This is the assessment in April?

Mr. Peck: In July.
Objection sustained.

A. I did not have the money.

Mr. Cash: Objection withdrawn.

Q. Why did you not pay your assessment?

A. Well, because I didn't have the money to pay it.

Q. Do you know whether anybody else paid the assessment on those particular shares that you bought?

Counsel for plaintiff objected, and the objection was sustained.

Q. I asked you last night in cross examination whether you were aware of the market and the sales in the market of stock of the Second National Bank between April 17th and July 22nd, and I believe you said you were not familiar with them. I will ask you whether you know what the stock of the Second National Bank was selling for between the first of December, 1911, and the first of April, 1912?

Counsel for plaintiff objected, and objection overruled, to which counsel for plaintiff excepted.

The Court: If you know.

A. Well, there was stock sold.

The Court: Do you know anything about it of your own knowledge?

192 A. I know of a certain sale that went through around that time that I testified to before.

The Court: He says he does not know anything further than he has already testified to.

A. That is all. I know just about a specific sale.

Mr. Peck: I haven't asked him about any sales heretofore in that period.

Mr. Cash: The witness says that is all he knows in any period.

Q. My question is, Mr. Gutting, do you know anything about the sales of the stock of the Second National Bank between the first of December, 1911, and the first of April, 1912?

Mr. Cash: Other than what he has testified to?

Counsel for plaintiff objected, objection overruled, to which counsel for plaintiff excepted.

A. I can't recall anything else except just what I testified to before.

Q. Did you give any testimony here as to sales between the first of December, 1911, and the first of April, 1912?

Counsel for plaintiff objected.

A. I think I did.

Q. You say you did?

A. I think so.

Q. Will you please recall what sales you testified to?

Counsel for plaintiff objected on the ground that it is a repetition.

193 Mr. Peck: If there is any such evidence I don't recall it.

The Court: Do you recall the testimony, Mr. Cash?

Mr. Cash: I do not.

The Court: Then he can answer the question—not as to what he testified, but the direct question, he can answer direct.

Q. Aside from what you testified to before, if any, do you recall any sales between—what the stock was selling for between December 1st, 1911, and April 1, 1912?

Counsel for plaintiff objected, objection overruled, to which counsel for plaintiff excepted.

A. No.

Redirect examination.

By Mr. Cash:

Q. Mr. Gutting, you don't, as I understand, remember any of the dates at which any of those accounts or parts of them were paid?

A. No sir, I can't give you the dates.

Q. You have a book over there that will show that, haven't you?

A. Over there, yes.

Q. You have a special account in which you put these collected accounts, don't you?

A. We have a special book where we put the accounts of things that were collected after the charge off that has been referred to.

Before that charge off they didn't go in that account.

194 Q. They did not?

A. Anything collected before, no sir.

Q. When the Clearing House turned over this property to the bank, after this assessment they turned over all these accounts with it, didn't they? They were all turned over to the Second National Bank, weren't they?

Mr. Peck: All these in this letter?

Q. All these in this letter and others that you had there?

A. Never anything taken away from it. They were always with the Second National Bank.

Q. You have a book that will show the dates of these collections, whatever they were? Your books will show that.

A. Our books will show the collections, yes sir.

Q. And since the assessment on your stockholders, the accounts mentioned in this report referred to by the Comptroller that have been collected appear in the special account, don't they?

A. Since the assessment, yes sir.

Q. In the special account that account would show the amount of the account and the amount collected on it?

A. Yes, sir.

Q. And what date it was collected, wouldn't it?

A. Yes, sir.

Q. Will you kindly let us have that this afternoon?

A. Yes, sir.

Q. Approximately what would be the amount of those accounts that were collected, if any of them, before the 9th day of December, 1911?

A. Oh, I couldn't approximate that, but it would amount to considerable. I know the Ohio River & Columbus was collected prior to that date. That was a big amount.

Q. How much was collected before that date?

A. Oh, I can't tell you off-handed.

Q. You can't tell us how much was collected before the 5th day of January, 1912?

A. No.

Q. Or how much of it before the 15th of April, 1912?

A. No.

The Court: Mr. Gutting, would all of that be available to you, that information?

A. It will be, but the payments prior to the assessment will take a longer time to get them out then after the assessment.

Mr. Cash: I have indicated the books I want on this matter that Mr. Peck has been asking about. Of course, I can't ask any question real intelligently until I see those books.

Q. In making up your statements to send to the Comptroller of the Currency for the year 1911 after this letter of March 4th and up to the time that the Comptroller sent the last letter to the bank making the assessment of 100% on your stock, did you ever take into account the items that he referred to in any way?

A. How could I when I didn't see the letter?

Q. In other words, as I understand it, then, all of the items that were referred to in the letter of the Comptroller of the Currency appeared in your statement as good, didn't they?

A. I don't know. It may be they were paid before some of those statements, I can't tell.

Q. Such as were not paid you took into account as good, didn't you?

A. My statements were exactly the condition of the bank as shown by the bank's books. If it were on the books of the bank then it showed in the statement.

Q. Of course, all these items appeared on your bank's books?

A. If they hadn't been charged off or something.

Q. I mean such as had not been paid?

A. Yes, sir.

Q. Or charged off?

A. Yes, sir.

Q. They were taken into account by you at their face value in making up your statements which were published?

A. Yes, sir.

Q. You never did make any change in your published statement or in your statement to the Comptroller by reason of these accounts at all?

A. I made my statement just according to the books of the bank exactly what the books of the bank showed was the way the statement was made and has to be made.

197 Q. This statement is a mere transcript of your books?

A. Yes, sir.

Q. Unless these items were charged off on your books, in making up your statement you took them—they would appear on their face as good?

A. If they were in the assets of the bank I took them for what they—

Q. Were they assets of the bank?

A. If they were not charged off or paid.

Q. In October your minutes show that you charged off about fifty some thousand dollars, don't they?

A. I don't recall. I believe around that time.

Q. Did that make a difference in the statement that you made up in December?

A. If they were charged off of the books it would make a difference of \$50,000.

Q. Were they charged off?

A. I can't tell you that.

Q. Don't you know they were not charged off?

A. I do not, no sir.

Q. Your minutes show they were.

A. Do our minutes show they were charged off?

Q. That they were ordered charged off.

A. They were ordered charged off—I can't tell you.

198 Counsel for defendant objected to Mr. Cash's statements to the witness above beginning with "Don't you know they were

The Court: That matter can be made plain by a subsequent question, which is open to either counsel at this point. Objection overruled.

To which counsel for defendant excepted.

Mr. Peck: I asked to have Mr. Cash's statement of fact made to the witness go out.

The said motion was overruled, to which ruling counsel for defendant excepted.

Q. You made a statement to the Comptroller of the Currency on December 5, 1911?

A. I believe so.

Q. The October 18th minutes which you have identified shows an order to charge off fifty some thousand dollars, doesn't it?

A. Yes, sir, \$52,029.96.

Q. When did you charge that off on your books?

A. I don't know.

Q. Did you at all?

A. I don't know.

Q. Did it make any difference in the statement from the previous statement you had made to the Comptroller?

A. You mean whether it was charged off or not? It would make a difference.

199 Q. In the statement you sent to the Comptroller in December, did you make any difference in your statement by reason of this being ordered charged off?

A. Made our statement exactly what the books of the bank showed.

Q. Would your books of the bank show when you charged off these items that were referred to in the minutes of October 18th?

A. Yes, sir.

Q. Can you give us that?

A. Yes sir, if they were charged off.

Q. You mean to say that they might not be charged off at all?

A. I mean to say they might not for all I know off-handed, yes sir.

Q. You have examined the matter, haven't you, to see whether they were charged off or not?

A. Not specifically, no. I have had a good many things to examine. I can't recall everything I have had to examine.

Q. You testified about this particular matter before, didn't you?

A. In what way?

Q. In another case?

A. Possibly I did. I have testified in a good many cases.

Q. You don't remember anything about it?

A. I can't recall, no sir. I probably looked it up, as far as I know, but what it was I can't recall.

Q. I wish you would look it up again and tell us whether it is charged off at all on your books, what is referred to in your
200 minutes of October 18th, and when it was charged off?

A. I will.

Q. Your minutes of May—it says "19 29"—1911 show that you passed a resolution there to charge to profit and loss items amounting to \$16,591.17. Do you know when those were charged off on your books?

A. I do not.

Q. Do you know whether they were ever charged off on your books?

A. I do not.

Q. You would not charge them off on your books, would you, unless you got an order from the Directors?

A. Me personally?

Q. Yes.

A. It wouldn't have been my place to charge them off. The discount clerk would charge them off.

Q. He would have to get an order from somebody?

A. Yes, sir.

Q. It would not be merely a resolution for he might not see that at all.

A. That is it exactly.

Mr. Cash: I would like you to get this. I will stop here until I can get this.

A Juror: I would like to get the date of turning that Galbreath loan over to the other bank; was that December 9th?

201 A. You refer to the date of the Galbreath note being taken by the Okeana Bank?

A Juror: Yes.

A. December 9, 1911, yes sir.

The Court: That is the date the note was given.

A Juror: That is the date the note was turned over to the Okeana Bank?

A. No, December 9th was the date they took the loan.

A Juror: That is what I mean.

A. In other words, we made a loan and charged their account; but the date that they came and got it out of the bank——

A Juror: No, that is what I meant.

Q. The other one was what date?

A. The other one was on January 5th.

The Court: Those are the dates that the loan was made?

A. Charged against the bank.

The Court: Here in Cincinnati for the bank and charged in the account with the Okeana Bank?

A. Yes, sir.

Thereupon the Court adjourned until Monday morning, March 29, 1915, at 10:00 o'clock.

Morning Session, March 29, 1915, ten o'clock.

C. A. BOSWORTH, being first duly sworn, testified in behalf of the plaintiff as follows:

202 Examination by Mr. Cash:

Mr. Moulinier: We want to cross examine Mr. Bosworth under Section 11497.

Q. Your full name, Mr. Bosworth?

A. C. A. Bosworth.

Q. Your present official position, if any, with the Second National Bank?

A. President.

Q. When did you become President?

A. 18th of July, 1912, I think.

Q. Prior to that time did you ever have any connection with the Second National Bank?

A. None whatever.

Q. As stockholder or any other way?

A. No.

Q. Then, during the time that the transactions occurred which have been referred to here, you had nothing at all to do with the bank?

A. No sir, I knew nothing about them.

- Q. In your experience, Mr. Bosworth, have you had as a banker?
- A. I have been more or less connected with the bank ever since I reached my majority.
- Q. That is a pretty good while?
- A. Yes, a good while.
- Q. Had you held official positions with banks during that time, too?
- 203 A. I was president of a bank in the county for several years.
- Q. That was at Wilmington?
- A. Wilmington, yes.
- Q. At the First National Bank?
- A. First National Bank, yes.
- Q. Then the banks in the city here?
- A. I was a director of the Fourth National Bank I think about eighteen years, and I was director of the Merchants National Bank two years.
- Q. Then you were sub-treasurer of United States, for a time, weren't you?
- A. About thirteen years.
- Q. Looking after the Government's finances here?
- A. Yes, sir.
- Q. Now, in the experience that you have indicated, Mr. Bosworth, covering quite a period of years, you have become familiar, have you not, with the method of determining values of bank stock?
- A. Oh, I suppose so, in a general way.
- Q. Now when you become president of the Second National Bank, did you make any examination of the affairs of that Bank?
- A. Well, I made rather a cursory examination. I went over the assets that the Clearing House directors had charged off, and had some conversation with Mr. McCune, who was managing the bank at that time. I did not make a very extended examination.
- Q. Did you go over them sufficient to satisfy your mind
- 204 as to what the condition was in 1911?
- A. No, I didn't know anything about the condition then, it was just the condition in July or June when they offered me the position at the bank.
- Q. Didn't you examine and go back behind that?
- A. No.
- Q. Do you know whether the condition was the same in 1911 as it was when you took hold?
- A. I don't know anything about it.
- Q. Now, in 1912, Mr. Bosworth, when you took hold, didn't you as the result of the examination which you had made, make a statement to the Tax Commission of the State of Ohio?
- A. Yes, sir.
- Q. And you believed that statement to be true, didn't you?
- A. I did.
- Q. You believe it still to be true?
- A. Yes.
- Q. That was sworn to by you, wasn't it?
- A. Yes, sir.

Q. By anybody else?

A. I think Judge Jelke subscribed the statement.

Q. Well, that statement was made as the result of whatever examination you made, and what opinion you then had as to the condition of the bank?

A. Well, I had more information about the bank in July when I made that statement than I did when I went in there, 205 because I had been at the bank a month or so.

Q. As the result of that examination, Mr. Bosworth, what would you say as to the value of that stock, the stock of that bank in 1911?

Counsel for defendant objected upon the ground that it is not proper cross examination, and that it is calling merely for the opinion of the witness.

Mr. Moulinier: Now, it strikes me this is the situation: Mr. Bosworth, a man of great experience in banking, becomes president of the bank. He then, as a part of his duty, makes an examination of the condition at that time. Later on for another purpose he makes an examination of the condition that existed the year prior to his taking charge. He found certain things. He then gives an opinion as to values. That is what we are asking him.

The Court: This examination is now under the form of Cross Examination as I am advised by Counsel; so that I am inclined to take this position, that the question may be answered as an expert opinion, assuming qualifications not only in capacity but upon acquaintance with the facts, and then the effect of the answer upon the right of either side can be gone into afterwards. On the question of qualification, do you desire to examine on the voir dire, Mr. Peck?

Mr. Peck: No. To make the record clear, we ask the Court to instruct the witness that he is entitled to answer or decline to answer this question of opinion.

The Court: On what score?

206 Mr. Peck: Because it is a matter of opinion evidence, and our understanding is that an opinion can not be forced from a witness who is not willing to give his opinion on a subject, distinguished from a matter of fact. That is the basis of our objection.

Mr. Cash: It does not appear that Mr. Bosworth is either unwilling or declines.

The Court: I am satisfied to over-ule the objection at this point.

Mr. Peck: Does your Honor overrule my motion to instruct the witness he is entitled to answer or decline this question?

The Court: At this precise point I do overrule your motion.

Mr. Peck: I reserve an exception to both rulings.

(Thereupon the stenographer read to the witness the preceding question: "As the result of that examination, Mr. Bosworth, what would you say as to the value of that stock, the stock of that bank in 1911.")

A. Will you let me look at my affidavit there to refresh my

memory? (The witness is handed a paper). Well, this is a question I will explain now, when I made this affidavit, I made it on the assumption that it was shown between January 1st and April 1st, 1912, an examination made as to the condition of the affairs of the bank by the Clearing House Association. Now, on that examination I made my affidavit. It wasn't the condition of the bank in 1911, I didn't understand that. It was the condition of the bank as shown by the examination of the Clearing House Association between January 1st, 1912—

Q. That you are referring to?

A. I understood when I made this affidavit that I was referring to the result of that examination.

Q. Well, now, the affidavit that you refer to is the affidavit in the printed copy that I handed to you?

A. It was in that. Yes, this is the one. It said: "Your petitioner further shows that—

Counsel for defendant objected, objection overruled.

A. (continued) I say "between January 1, 1912 and April 1, 1912 an examination of the condition of affairs was instituted by the Clearing House Association, and that it was then discovered that such banking association had through injudicious investments suffered losses." Now, that is the affidavit that I made.

Q. Well, then, the affidavit you made—

A. When I made this affidavit I did not have in mind the condition in 1911. I had before me this examination of the Clearing House.

Q. Well, now, the affidavit that you have referred to, Mr. Bosworth, is the affidavit contained in the record which you have had in your hand, which is directed to the Honorable Tax Commission of the State of Ohio?

A. Yes.

Q. And that is the affidavit that you did make.

208 A. Yes.

Q. As appears there?

A. Yes.

Q. Have you the original of that affidavit, is that in the Bank?

A. You mean the—

Q. The original of that paper?

A. Well, I suppose we have a copy of it. I don't know. We always keep copies of them.

Q. This is a copy that is printed, this record, isn't it?

A. Yes.

The said pamphlet was marked by the stenographer for identification: Id. #41.

Q. Mr. Bosworth, at the time this affidavit was made which you have referred to, which was filed with the Tax Commission of the State, and which, this you say is a copy, and which is the printed record marked for identification #41, you were president of the bank, the Second National Bank?

A. Yes, sir.

Q. This affidavit was made, was it not, for the purpose of remission of your taxes of the Bank's stock for 1911?

A. For the remission of the second installment. The bank had paid the first installment, according to my recollection, and this was—

Q. For what year?

209 A. I think this was the installment that was due in June, 1912, possibly.

Q. Yes, but that was for the second half of 1911?

A. Yes. The first half had been paid.

Q. Therefore your statements were made with reference to the condition of the bank in 1911, were they not?

A. Well, it was made in reference to that examination of the Clearing House Board, that was as far back as I went, and I say that in my affidavit.

Q. The tax returns that were made for the year 1911 were made in May, wasn't it. That is the regular time?

A. Yes, that is the time.

Q. The 3rd of May?

A. The first Monday I think in May.

Q. Of each year?

A. Yes.

Q. So that the return for 1911 was in May of 1911?

A. Yes.

Q. Well, your statements in this affidavit were in reference to that return, were they not?

A. Well, it was with reference to the Clearing House examination—

Q. I know, but—

A. —The Judge's argument before the Commission was with regard to that.

Q. I am speaking now of the affidavit which you signed?

210 A. Well, that is the affidavit that I signed, that is what I understood that I was swearing to, as the result of that examination in 1912.

Q. This affidavit appears to have been made and sworn to by you before James R. Clark on the 29th day of July, 1912?

A. Yes.

Q. I suppose that is the correct date?

A. Yes, I suppose so.

Q. Now, in this affidavit, didn't you say, Mr. Bosworth, "Upon such examination the Comptroller of the Currency ordered charged off as worthless and without value a large amount of paper, notes, bills, stocks, bonds, securities and assets, all of which stood upon the books of the bank, in April, 1911 at the time of the tax return aforesaid" that is, referring to the 1911 tax returns,—“and were then worthless and without value”—di-n't you say that?

A. At that examination.

Q. No, isn't that the statement that you made in this affidavit, referring to April, 1911?

A. I didn't understand it that way.

Q. (Reading from affidavit:) "That the officers of said bank had been unlawfully speculating and promoting enterprises of their own which were failures, and that by injudicious investments, the funds and assets of said bank had been dissipated and lost, and that this had transpired and been committed by the said officers prior
211 to the tax return aforesaid; and that the tax return made by them was false and deceitful, was made for the purpose of deceiving the National Bank Examiners and the Comptroller of the Currency, the Clearing House Association of Cincinnati and all of the stockholders of said bank, and the public, and for the purpose of concealing their improvident and unlawful acts, said tax return was untrue, that on its face it showed a taxable value as hereinbefore set out, whereas, in April, 1911, the shares of said bank by reason of such conduct and dissipation of the funds on the part of its officers were valueless and that the shares had no taxable value whatever, and should not have been listed as having value, all of which these complainants stand ready and offer to prove to your Honorable Commission."

Counsel for defendant objected.

The Court: Re-form your question, and then——

Mr. Moulinier: Well, strike out that it was made for the purpose of deceiving the National Bank Examiners or the Comptroller of the Currency, the Clearing House Association, and all of the stockholders of the bank and the public, and for the purpose of concealing their improvident and unlawful acts——

The Court: If that part of the question is stricken out, the witness will be understood to have his answer called for upon the rest of the question, omitting that part, the objection is overruled.

212 Mr. Peck: Note an exception. Might I ask Counsel to restate his question, as amended.

The Court: I take it that the ground of my ruling is understood, it is a question asking as to fact, not as to conclusions.

Q. Leaving out of the question what has already been indicated, Mr. Bosworth, characterizing any of the conduct of the previous officers of the bank, or their reason for doing what they did, my question was whether you did not state at that time in that affidavit to the Tax Commission that the values of the shares of stock of the Second National Bank at the time of that tax return, in April, 1911, were valueless?

Counsel for plaintiff objected, objection overruled, to which ruling, Counsel for Plaintiff excepted.

A. Well, I arrived at my conclusion——

Q. You may explain that afterwards if you want to, but I want to know whether you stated that, then, you can tell me yes or no, can't you?

A. Yes, I stated that if it is in that affidavit.

Q. I did not get that.

A. Yes.

Q. You looked at it to see that I am reading it correctly?

A. Yes, that is in the affidavit. I wanted to explain my reason for that.

Q. Not only that it is in the affidavit, that is the statement that you made at that time?

213 A. Yes.

Q. Now, if you want, tell us the reason for it.

A. Well, it was the result of that Clearing House examination in 1911. I wanted to explain that I did not go back to any examination of the bank before the Clearing House examination, prior to the Clearing House.

Q. Now, to make up your mind about the condition in 1911, which you have referred to here, did you get any other information than what was communicated by the examination of the Clearing House Committee?

A. I didn't think so, no.

Q. You didn't need to go back any further than that?

A. No.

Q. Now, as a result of this affidavit to the State authorities, the State authorities remitted your taxes on that capital stock on the last half of 1911?

Counsel for defendant objected, and the objection was sustained, to which ruling of the Court Counsel for plaintiff objected and avowed that if the witness were permitted to answer, he would state that they did.

Q. I will ask you whether after this application was made by you, as the President of the Bank to the State Tax Commission, whether the Bank paid any taxes for the last half of the year 1911 on its capital stock?

Counsel for the defendant objected, on the ground that it is incompetent, irrelevant, and immaterial, and the objection was sustained.

214 To which ruling of the Court, Counsel for Plaintiff excepted and avowed that, if the witness were permitted to answer, he would state that they did not.

Q. Mr. Bosworth, in your experience as an officer in National Banks, and banks that you have been connected with as you say is this customary—for banks of that character to make loans for their country correspondents?

Counsel for defendant objected, objection overruled, to which ruling counsel for defendant excepted.

A. I can't say it is a custom. It is done by some banks. It is not a universal custom by any means.

Q. Isn't it done by the Second National Bank now?

A. Yes.

Q. Wasn't it done by the Merchants National Bank with which you were connected?

Counsel for the defendant objected; objection overruled, to which ruling Counsel for Defendant excepted.

A. I don't remember of ever seeing any loans made for customers in the Merchants. No sir, I don't think they did.

Q. Were you familiar with that feature of the bank's business?

A. Well, I was on the Executive Committee most of the time I was there. I think I would have heard of it if they had made them. I know I would.

Q. Has that practice ever been criticized by the Comptroller's office, that you know of?

215 Counsel for Defendant objected, and the objection was sustained, to which ruling of the Court, Counsel for Plaintiff excepted and avowed, that, if the witness were permitted to answer, he would say that it has not.

Q. I understood you to say that the Second National Bank under your guidance, as President, is doing that thing that I have referred to.

Counsel for defendant objected; objection overruled, to which ruling counsel for defendant excepted.

A. I answered it before, that they did.

Counsel for defendant moved the preceding answer be stricken out, motion overruled, to which ruling Counsel for defendant excepted.

Q. Mr. Bosworth, I will ask you to state whether a \$1,000,000 of new capital was paid in before you became President, or after?

Counsel for defendant objected, and said objection was sustained, to which ruling of the Court, Counsel for Plaintiff excepted, and avowed that if the witness were permitted to answer, he would say that it was.

Q. I want to ask another question right there, your Honor please because the first one may not cover what I want—whether the assessment made under the direction of the Comptroller of the Currency on the stockholders of the Second National Bank amounting to a \$1,000,000 was paid in by the stockholders or by anyone else at any time?

A. Yes, sir.

216 Now, then, I want to show you some papers and ask you to look at them, and tell me after you have looked at them whether those are the statements sent out by the Bank?

A. Yes, sir.

Mr. Cash: Mark them for identification.

The stenographer marked the said papers for identification, Id. #42, Id. #43, Id. #44 and Id. #45, respectively.

Mr. Peck: These statements, from that time down to this time, we object to that. We do not see how those are material in the matter.

Mr. Cash: I am going to offer them. I am about to offer them.

Q. I would like to ask what they are, for what years, covering what years? 1912?

A. 1912, 1913, 1914, and 1915. I think the statements are for four years.

The Court: You are offering these for what purpose?

Mr. Cash: Why, to show the assets of the bank subsequent to the time that has been referred to by one of the witnesses. The figures are all here. It is a matter of argument. I do not want to speak of it now, but I want to ask Mr. Bosworth another question with reference to it.

The Court: Well, you have made this offer, have you?

Mr. Cash: I have made this, yes.

The objection of the defendant to the said statements being admitted in evidence was sustained, to which ruling Counsel
217 for Plaintiff excepted, and makes proffer of the said statements which are attached herewith as part hereof, marked as aforesaid, Id. #42 to #45 inclusive.

Q. I will ask you this question, Mr. Bosworth, whether any moneys collected subsequent to the time that you became president on any of the assets of the bank referred to by the Comptroller, or in the Kane letter, or anywhere else, were placed among the assets of the bank and would show upon any statement you made subsequent to that?

Counsel for defendant objects.

The Court: Does this go to the time when they were paid, if they were paid at all?

Mr. Cash: Yes.

The Court: I think the position indicated before will have to cover this proffer. I will exclude it with the statement to Counsel that, if it becomes necessary to reach certain proofs, the ruling will be given wider scope. The objection is sustained.

To which ruling of the Court Counsel for Plaintiff excepted.

Q. You practiced law, too, for a number of years, didn't you?

A. Yes, sir.

Q. How many?

A. I was associated six or seven years, I guess.

Q. In this city?

A. Yes.

Q. With the firm of Foraker, Black and Bosworth?

218 A. Yes, sir.

(No cross-examination.)

(The witness leaves the stand).

J. G. GUTTING, who has heretofore testified, was recalled to the stand for further examination, and testified as follows: in behalf of the plaintiff:

Direct examination.

By Mr. Cash:

Q. Have you made up those statements we asked about? Will you let us look at the statements you made up with reference to it. The statements that you have handed me, Mr. Gutting, are the statements from the books of the Second National Bank?

A. Yes, sir.

Q. Do they accurately and correctly show what became of the different matters referred to in the Kane letter?

A. Yes, sir, to the best of my knowledge.

Q. Now, are you able to state, Mr. Gutting, what amount of actual money was received by the Bank on the accounts and letters referred to in the Kane prior to December 5, 1911—December 9th, I should say?

A. The only way I could tell you by going through that statement I have given you and picking out the dates when all these different things were paid. That statement will tell the date that it is paid and what became of it.

219 Q. Would that be some trouble for you to do that from the memorandum that you have?

A. Quite a little bit of work. You see everything is itemized there.

Q. Would your answer be the same as to any amount paid before the 5th of January, 1912?

A. That statement shows just what happened to the items, whether they were paid and when they were paid and all about it, as near as I can tell you.

Q. Coming up to the 15th of April, what would be your answer as to that?

A. The 15th of April what year?

Q. 1912.

A. Well, practically the same answer.

The Court: What is the answer, you mean you can't tell?

A. That the statement tells the history.

Q. Can you tell us from memory in making up these items, what amount of money, I mean actual money was paid on these accounts up to the 15th of April, 1912, that is the accounts and matter referred to in the Kane letter?

A. No sir, not from memory.

Q. Can you approximate it?

A. No, I haven't tried to keep up with what amount was paid up to date. They are itemized just exactly the day, I took each item for itself, itemized just exactly the figures.

220 Q. I will ask you to state whether it wasn't in the neighborhood of \$70,000?

A. I wouldn't try to estimate it at all.

Q. You did try in the other case?

A. What case was that?

Q. In the case that was brought against the directors of the bank and you among the rest?

A. I don't recall it. Maybe I did, maybe I didn't. It is a bad thing to try from memory.

Q. Can you tell us what the total amount is that was paid in on these accounts referred to in the Kane letter up to the present time?

A. No, not without going over the books again and getting up the total for you. As before, I treated each item separately as you asked me to do.

Q. And that cash received on those accounts, where did it go?

A. Where does it appear in the books of the bank?

Q. At any time that it is collected, from January 4th or 5th, 1911 up to the present time?

A. It would depend entirely on where the item was. If it is in the current loans, it would go to the credit of the loan account. If it were in the profits and charged off to Profit and Loss, it would go to the credit of Profit and Loss. If it were in the Contingent Fund, it would go to that. It depends entirely on where the loan is.

221 Q. Wherever it appeared it would be in the assets of the bank wouldn't it?

A. Yes. If it was paid it would go into the assets of the bank.

Q. And would show in the statements that were made by the bank?

A. Do you mean itemized separately?

Q. No, I mean it would show as a factor in the statement?

A. The statement would show all assets of the bank, is that what you mean?

Q. That is what I mean.

A. I will correct that answer, I do not mean that. The statements do not show all the assets of the bank. It shows all the assets carried as live assets of the bank, that is what I mean to say.

Q. How many of these were carried as dead assets?

A. Any of them that were in the Profit and Loss or Contingent Fund that have been carried as dead assets.

Q. What I asked you was not about either live or dead assets, but was about money actually received on any of these accounts?

A. Well, as I said before it all depends upon where the account is. If it was in our notes, it would go to the credit of Notes Discounted. If it was in our Profit and Loss, it would go to the credit of Profit and Loss. If it was in our Contingent Fund, it would go to the credit of Contingent Fund, goes into the assets, live assets.

Q. If the actual money was paid in, it would show somewhere, wouldn't it?

222 A. It goes into one of the live assets, if the actual money is paid.

Q. It shows as money paid?

A. Yes, sir.

Mr. Cash: I will ask you to identify those statements.

Mr. Peck: Note an objection.

The stenographer marked the said statements for identification, Id. #46, Id. #47, and Id. #48, respectively.

Q. Taking this statement that the stenographer has marked Identification #46, couldn't you have somebody else take these statements and tell us what amount of money was actually paid up to the 9th of December?

A. I can.

Q. And up to the 5th of January?

A. Yes, sir.

Q. And up to the 15th of April?

A. I can have it figured out for you.

Q. Then it would be easy to get from that what was paid since?

A. Yes sir, give me the dates you want and I will have it all figured out for you.

Q. December 9, 1911, January 5, 1912, and April 15th, 1912, and then up to your last statement, whenever that was?

A. These items?

Q. Those are the items which are in the Kane letter, are they?

A. Yes, sir.

223 Q. What I want, so there will be no misunderstanding, that is the cash paid in, not mere book-keeping entries, nor shifting of notes, but actual cash paid into the bank?

A. You call a check cash, don't you?

Q. It depends if it was paid?

A. That is what I mean, paid with cash, it is called cash.

Q. Of course, if the cash was paid on the check you can regard it as cash. Mr. Gutting, you had here and I guess you have them still the minutes of the Board of Directors of the Second National Bank of February 23rd, 1912, I think it was?

A. Yes, sir.

Q. Now, Mr. Gutting, the minutes of February 23rd, 1912, show a list of bonds and stocks? Do you know whether that is the list of bonds and stocks that is referred to by the Comptroller in what we call the Kane letter?

A. I don't think he specifies, does he?

Q. No, but he speaks of it as bonds and stocks.

A. No, I wouldn't have any way of knowing positively, I wouldn't know whether that is what he refers to or not in his letter.

Q. Did you have any other list of bonds and stocks belonging to the bank except those that are there about which there is any question about their goodness or value?

A. Not that I know of.

224 Q. The Comptroller refers there that there is an estimated loss of \$38,000.00 on the items in the Schedule of Bonds, Securities, etc. He did not enumerate just what they were. Can you tell us what they were?

A. I haven't any idea what he referred to.

Q. Can you tell us how long the stocks and bonds as shown by your accounts on that date, were carried in the Bank?

A. No, I couldn't tell that, not without tracing back the origin of each entry, finding out when it came in.

Q. On that date the Board of Directors charged off how much on the Bonds and Stocks account?

Counsel for defendant objected, objection overruled, to which ruling counsel for defendant excepted.

A. \$181,613.40.

Q. That is on bonds and stocks alone, isn't it?

A. Yes, sir.

Q. Have you totalled there the face value of the bonds?

A. No, sir.

Q. What are the figures there, what do they represent, the face value of the bonds or the figures which stood on the books?

A. The figures which they stood on the books.

Q. Then by that figure that stood on your books, the Board charged off \$181,000.00?

A. \$181,613.40.

Q. Among those bonds was the Interurban Railway Terminal Company—that was Mr. Davis's company, wasn't it?

225 A. Well, he was president of it.

Q. Mr. Davis was president of that and president of the bank?

A. Yes, sir.

Q. The total amount of those bonds on which you made a charge off of \$5,950.00, was \$65,700.00. Aren't those bonds worthless?

Counsel for defendant objected, objection overruled, to which ruling Counsel for Defendant excepted.

Q. Are they worth anything?

Counsel for defendant objected, objection overruled, to which ruling Counsel for Defendant excepted.

A. I am not familiar with what they are worth at the present period.

Q. Have you ever collected anything on that \$65,700.00?

A. The Interurban Bonds?

Q. Yes.

A. No sir, nothing but interest on them was collected after that date I think.

Q. Nothing but interest?

A. Yes.

Q. The Company is in the hands of a receiver, isn't it, at the present?

A. Yes, sir. It wasn't then.

Q. You want us to understand that you collected interest on any of the bonds?

A. That is it.

226 Q. Did they ever pay interest on their bonds.

A. Yes, sir.

Q. How long ago?

A. Up to the time they went into the hands of a receiver, I think, very close to it. It was the fact of quitting the interest on their bonds, as I understood, that made them go into the hands of a receiver.

Q. You can't tell us how long ago that is?

A. No.

Q. You have a list here of Columbus Street Railway Four Per Cent, \$135,240.00, on which you charge off \$15,640.00?

A. Yes, sir.

Q. What about those, have you collected anything on those since?

A. Those bonds were all sold, but at what price I can't recall.

Q. You had Cincinnati, Dayton and Toledo, \$49,391.40?

A. I think those were sold also.

Q. At this time you charge off \$34,091.40 on that item?

A. Yes, sir.

Q. Do you know what those bonds stood on your books for?

A. No, sir.

Q. What price?

A. No, sir.

Q. Do you know what their value was?

A. No, sir.

227 Q. Or is?

A. No, sir.

Q. You have here Western Furniture Company \$85,000.00 on which you charge off \$34,000.00 at this time?

A. Yes, sir.

Q. Weren't those bonds worthless?

A. No sir, we got something out of it. I don't recall what.

Q. How much did you get out of it?

A. I thought I had that here. I don't seem to have it.

Q. If there has been any money paid on it, you have it there.

A. Yes sir, there was money paid on it.

Q. Then you haven't got it there?

A. I have got it somewhere, if I can find it.

Q. That was the Western Furniture Company, wasn't it?

A. Yes, sir. Oh yes, how many were there of them?

Q. According to your Minutes here on that date there were \$85,000.00.

A. We sold those, we got \$9,000.00 out of those.

Q. \$9,000.00 out of \$85,000.00?

A. Yes, sir.

Q. You charge off on the Minutes here \$35,000.00, don't you?

A. Yes, sir.

Q. So that you had to charge off a much larger amount, didn't you?

A. Yes, sir.

228 Q. Before you got through?

A. Yes, sir.

Q. Did you get \$9,000.00 in money out of them or in some other way?

A. I reckon it was money of some kind. The books say \$9,000.00 paid.

Q. You got another item here among the stocks and bonds, Ford & Johnson Company, \$177,500.00. You charge off on this date \$71,000.00 to that. What became of the rest?

A. The Ford & Johnson Company was reorganized, a new stock company formed, and we bought a lot of bonds of the Company or stock, I don't know which it was.

Q. Is that what is referred to here? The bonds of that Company?

A. No.

Q. That is after this?

A. Yes sir, after this. It has a new name altogether, a new company, operating at Michigan City.

Q. What actual money did you get out of that stock or bonds, whatever it was?

A. We didn't get any actual money. We got the bonds in this new company.

Q. And you still have them have you?

A. Yes, sir—bonds or preferred stock. I am not sure which it is, one or the other. Both, I believe.

229 Q. Do you know when you got those, about when?

A. No, I can't tell you from memory.

Q. About three years ago, wasn't it?

A. I don't know what the date was when we got them?

Q. And you never collected any money on that at all?

A. No.

Q. And there is no interest or dividends or coupons on what you exchanged them for?

A. I think that we got payment of our coupons at first, but we haven't gotten any coupons collected, not recently I think.

Q. You have Cripple Creek Central Railway Company, \$25,200.00. What was that, stock or bonds?

A. Is it among the bonds?

Q. Yes, bonds and stock,—well, I don't know, stock and bonds.

A. I think that was stock, if I am not mistaken.

Q. Has the bank still got that?

A. No, we haven't got it any more.

Q. How much money did you get out of it, if anything?

A. I can't tell you that, I don't know.

Q. On this date, you ordered charged off, your Board of Directors did, out of that \$25,200.00, \$12,800.00.

A. Yes.

Q. And you can't tell us whether you got anything out of what was left?

A. I can't tell you, no sir.

230 Q. The Central Storage Warehouse Company, \$12,000.00, on this, too, you charge off \$4,800.00, off of that item. What if anything, did you get out of the balance?

A. The Central Storage and Warehouse, we sold for \$6,000.00.

Q. \$6,000.00?

A. Yes.

Q. So that was just half of what its face value was?

A. Yes, sir.

Q. And half of what it stood you on your books?

A. Originally, yes.

Q. You got \$6,000.00 in money?

A. Yes, sir.

Q. Or in some of the stocks and bonds?

A. No other stocks.

Q. What does your memorandum show?

A. Paid \$6,000.00.

Q. Does it show how it was paid, anything about it?

A. No, but my recollection is that we got cash or checks, something of that nature for it.

Q. American Publishers Company, \$10,000.00, from which you charge \$2,000.00 on this date?

A. Bonds?

Q. I can't tell, it is among stocks and bonds.

A. We still have the American Publisher Company bonds. They are paying their coupons on them.

231 Q. You say they are paying their coupons?

A. Yes, sir.

Q. What did you charge off, \$7,500.00 then?

A. I think we charged them all off, if I am not mistaken, down to \$1.00, carrying them at a \$1.00 on our books.

Q. You charged off \$7,500.00 at that time?

A. Yes, sir.

Q. And charged off some more later on?

A. I think so.

Q. You say they are paying their coupons?

A. Yes, sir.

Q. What did you charge them off for, then?

A. We were told to charge them off.

Q. You have got the Co-operative Agencies Company, \$10,000.00 from which you charge off \$6,000.00. What did you ever get out of that?

A. I don't remember that at all.

Q. Do you know whether it was stock or bonds?

A. I think it was stock. I don't think we got anything out of it.

Q. Western and Atlantic Fire Insurance Company, \$5,000.00, from which you charge off \$3,750.00 at this time?

A. That was sold and we got---no, I can't tell you what we got in it. We got the cash on it.

Q. It would not show you on that memorandum?

32 A. No. I didn't look that up.

Q. Do you know whether that was a loss on it or not?

A. Yes.

Q. A further loss?

A. I don't know about a further loss, there was a loss on it over

what the bank originally carried it at. I don't know whether there was a further loss after that charge off or not.

Q. Cincinnati, Dayton & Toledo, \$49,391.40, a charge off on this date of \$34,091.40?

A. They were sold also.

Q. What did you get for them?

A. I can't recall. I can have those looked up for you if you want me to.

Q. I thought you would remember it. You don't know what they sold for.

A. No, sir.

Q. That is, the C. D. & T.?

A. Yes, sir.

Q. Who of the directors or officers were interested in that Company?

Counsel for defendant objected; objection overruled, to which ruling Counsel for Defendant excepted.

A. I don't recall that any of them were interested in it.

Q. The Knoxville Railway, Light and Power Company, \$5,000.00 charge off of \$200.00 at this time. What about that?

233 A. I am under the impression that was paid in full.

Q. What was it, stock or bonds?

A. It was bonds.

Q. New Orleans and Great Northern, \$55,600.00, a charge off of \$10,000.00—another railroad in the hands of a receiver, isn't it?

A. Yes, sir.

Q. Did it ever operate at all?

A. I don't know that.

Q. Do you know where the railroad runs from or to?

A. No, I have no idea.

Q. And that stood on your books at \$55,600.00. You don't know what you got for that?

A. I don't know what we got out of it. I know we got something out of it. Our holdings were sold and we got something. What it was, I don't know.

Q. On this same date, including the charges off that I have referred to on your stock and bonds account, you charged off from your books \$601,405.22, is that right?

A. Yes, sir.

Q. Were those actually charged off on that date?

A. Either on this date or close to this date, they were actually charged off.

Q. Could you tell us the dates that they were charged off your books?

234 A. Not from memory. I can let you know exactly, if you want me to, but it was close to that date if not exactly on that date. They were charged off February 24th.

Q. That is 1912?

A. Yes, sir.

Q. That is the same day that you made out a report to the Comptroller, wasn't it?

A. I think not.

Q. What was the date of the last report that you made to the Comptroller before April 15th, 1912?

A. I don't know, but at any rate we wouldn't know anything about that report coming in until the Comptroller always calls back there, he never calls on a specific day.

Q. That is he calls on you, asks you to make a report of a day or two before that maybe?

A. Yes, generally more than that.

Q. Two or three days before that?

A. Yes, sir.

Q. If your report was made on the 24th, after the 23rd of February, so that you had this information and knew that it was going to be charged off, you wouldn't take any account of it in the report that you made to him, is that correct?

A. I don't understand that question. In order to make the report to the Comptroller we have to make exactly what our books show. When the examiner calls next time he demands all our reports, and he checks them back against our books. He doesn't ask me whether we considered this or that, but he checks it against our books. They must agree with our books.

Q. You speak of getting money out of some of these accounts that the Comptroller referred to in his letter of March 4th. I will ask you whether or not it is not a fact that quite a number of items that he did not call any special attention to or otherwise reported as in his opinion good, you did not have very substantial losses on?

A. You mean items that were not at that time, but afterwards we charged them off?

Q. Yes.

A. Yes, we charged off items.

Q. Take for instance this bond account, the Comptroller refers only to a shrinkage of about \$38,000.00?

A. Yes, sir.

Q. You charge off yourself in February \$181,000.00 on your bond and stock account?

A. Yes, sir.

Q. \$181,613.40—a difference of over \$150,000.00?

A. Yes, sir.

Q. You have already testified to further losses on the same items that you did not charge off on that date, is that so?

A. I think so.

Q. Mr. Gutting, I want to ask you as cashier of the Second National Bank to this effect, that taking into consideration the amount of money that had been paid on these accounts referred to in the Kane letter and the amount of money that has been lost in these items which the Comptroller does not make any mention of, that the actual receipts of money over and above the losses have not exceeded \$200,000.00 up to January of this year?

A. What you want to know is if the total amount of stuff we have

collected after this letter, less other stuff which we have charged off did not exceed \$200,000.00, is that the idea?

(The stenographer read to the witness the preceding question.)

A. I know the net amount would not exceed \$200,000.00, that is to say, we have collected more than that, but we charged off stuff that the Comptroller passed as good, and the Clearing House bankers classed as good when they came in, and the net amount after making those other charges would not exceed the \$200,000.00 that we have collected up to date.

Q. In other words, as I understand you, there were some items that the Comptroller called attention to that were either good or partially good and were collected?

A. Yes, sir.

Q. And there were some items that he called attention to or did not call attention to which were bad and which you have had to charge off?

A. Yes, sir.

Q. And, balancing those up, as to the actual amount of
237 money received, you say it would not exceed over \$200,000.00?

A. No, sir, not so far.

Q. You speak about one of those loans, what we called the Cutter loan. That was a loan, I understood you, that was made by the President individually?

A. No, it was a loan made by Cutter in New York, which the president had guaranteed, or in other words, authorized the bank to charge it against our account when it would come due.

Q. Which president, you mean Mr. Davis at that time?

A. Yes, sir, Mr. C. H. Davis.

Q. For whose accommodation was it?

A. I think the Ford & Johnson Company got the benefit of it.

Q. An then these matters came up with the Comptroller and the Directors of the Bank guaranteed that loan?

A. Yes, sir, guaranteed that loan.

Q. Now, when you charged off this \$601,000 and a fraction in February, your bank borrowed over \$600,000 from other banks didn't it?

A. Our bank borrowed from time to time, not I don't think at this specific time.

Q. Well, now, let me read what the resolution said on that same date: "The following resolution was offered by Mr. Omwake, seconded by Mr. Robinson, and on the roll call unanimously adopted:

Resolved that the action of the officers in borrowing \$200,700
238 from the First National Bank of Illinois, \$210,000 from the Dearborn National Bank, Chicago, Ill., and \$200,000 from the Mechanics and Metals National Bank of New York, under the old resolution adopted August 5th, 1910, and the same is hereby approved." What does that refer to?

A. That refers to money which we had borrowed from those banks and my recollection is the Examiner claimed that that resolution was old, and a new resolution should be passed authorizing the

officers to borrow the money. The consequence is they passed that new resolution, affirming the action of the officers in having borrowed under that old resolution.

Q. Had the money actually been borrowed before this time?

A. I think so, yes.

Q. It was this money borrowed for the purpose of covering up the \$601,000 you had charged off?

A. No. That money had been borrowed previous to that time.

Q. That had been borrowed previous to that time. Was there any other object in it except what you have stated, that mere form of the resolution?

A. No, sir, I can't think of any other object in it.

Q. Now, at the same time, there was another resolution that all obligations of the bank should show on the general statement book. Up to that time the obligations of the bank did not show on the general obligation book, did they?

A. Well, we thought they had. I think that there was some paper that had been sold without recourse that the Bank Examiner classed as an obligation of the Bank, and that is why they had that clause added, that all obligations should show on the statement book of the Bank; and besides that \$95,000 Cutter note, he always classed that as an obligation of the Bank. We did not.

Q. You did not regard that as an obligation of the Bank?

A. No, sir.

Q. Now, I asked you the other day, Mr. Gutting, about a charge off that was made in October, 1911, and asked you to find out for me if that actually appeared on your books as having been charged off?

A. Yes, sir, you mean the resolution of October 19—October 18, 1911, yes, sir.

Q. When were the items in that actually charged off on your books?

A. I have got a schedule here. This is what happened to them when they were charged off.

Q. Read it to us.

A. The German Russell Company, \$3,000, charged to Profit and Loss February 24, 1912.

Q. That was one of the items that was ordered charged off on October 18th?

A. The first item on this list.

Q. Are they all the same there?

A. All of the items are appearing on this.

Q. They were ordered charged off October 18, and you are telling us when they were actually charged off.

A. Frazer D. Acomb, \$350.00, \$250.00 charged to Profit and Loss February 24th. Paid April 2nd. T. C. Campbell, \$6,000 2,500 paid February 15; \$3,500 charged to Profit and Loss, February 15, 1912. Andrew T. Hurd, \$759.25, charged off February 3, 1912. Smith-Pattison Co., \$808.00. Paid November 27, 1911. Huntington China Co., \$9,922.34. \$2,500 paid February 24, 1912. 7,422.34 charged to Profit and Loss February 24, 1912. C. W. and J. I. Stewart, \$286.50, paid February 10, 1912. C. W. Stewart

\$1,330. Paid February 10, 1912. The Bank of Kentucky, \$421.81. We are unable to find our ledger sheet on that and, therefore, we couldn't trace it down. A. E. Hudson, \$1,800.54, and \$2,145.32 charged to Profit and Loss, February 24, 1914. W. E. and Ell Smith, \$319.10, paid September 9, 1913. Cripple Creek Central Railway Company, \$10,000 charged to Profit and Loss February 24, 1912. E. H. Smith, \$14,987.10, charged to Profit and Loss February 24, 1912.

Q. That is all the items referred to in that resolution of October 18, 1911?

A. Yes, sir.

Q. Were you Secretary of the Board at that time?

A. Yes, sir.

Q. And were you present at that meeting of the Board of Directors?

241 A. Yes, sir.

Q. And wrote up the minutes?

A. Yes, sir.

Q. Now, Mr. Gutting, you made a statement to the Comptroller of the Currency on December 5 of the same year in which you said that your undivided profit account in September—on September 1st you made a report in which your surplus or undivided profit account showed \$106,874.00. That was before this meeting of the Board of Directors, was it?

A. Yes.

Q. Now, then, on December 5th, 1911, which was a considerable time after that resolution was passed, your undivided profit account was reported to the Comptroller as \$113,041.00. In other words it had increased about \$7,000, whereas you were ordered in there to charge off amounts aggregating \$52,000. You didn't charge that off before this next statement was made?

A. I gave you a list of just exactly what happened to them.

Q. Notwithstanding that you knew that your Board of Directors had ordered them charged off in October, in December of the same year, you made a report to the Comptroller of the Currency which did not show any of them charged off, but showed an increase in your surplus, or of undivided profits, of about \$7,000?

A. I myself, I personally—

Q. No, I am not asking you what you did—that is what you did—isn't it?

A. Yes, sir.

242 Q. Now, if you have charged off that \$52,000 before you made that statement of December 5th, your undivided profit would have been down to less than \$50,000—\$106,000 it was before about \$50,000?

A. If we had charged off the items, whether they were paid or not?

Q. Yes, none of them were paid at that time, were they?

A. I don't recall.

Q. Now, when you made the statement to the Comptroller of

December 5th, why didn't you show the true amount of your undivided profits?

A. It showed our statement exactly what our books showed. It wasn't my place to look after the charge off. I wasn't the Executive head of the bank.

Q. They had been ordered charged off on the 18th day of October?

A. Yes, sir.

Q. And that was not done?

A. No.

Q. Wasn't the purpose of that to show the condition of the bank was other than what it actually was?

A. The chances are I didn't even have it in mind when the statement went off from there, whether it was charged off or was not charged off.

243 Q. An item of \$52,000 wouldn't have made any impression on you?

A. A bank with \$15,000,000, not so awfully much.

Q. How was it that when you were ordered to charge them off in a resolution of October 18, that you did not actually charge off any of them until about February of that year?

A. I don't know.

Q. Is that good banking business?

A. I wouldn't think so. I should think when the directors said they would charge them off, they ought to be charged off in my estimation.

Q. You were the cashier?

A. Yes sir, I was.

Q. You had charge of the mechanical operation of the Bank?

A. I don't think cashiers charge those things off without instructions from the president in any bank.

Mr. Cash: I want to offer these minutes with permission to put in copies of them, October 18 and May 29th, 1911; April 6, 1912 and February 23, 1912, heretofore marked for identification Nos. 37, 38, 39 and 40.

Mr. Peck: No objection to the copy, to substituting copies for the original. We object to these severally, and to the action taken in May 29, 1911, the action taken February 23, 1912, the action taken April 6, 1912,—the two last are subsequent in the transaction in the case and the first one is nearly a year prior to the trans-
244 action in question. Also for the purpose of record we object to the one of October 18, 1911.

The Court: That is offered for the purpose of reflecting on the actual value?

Mr. Cash: The actual condition before that and that they knew it. To which ruling of the Court Counsel for defendant excepted.

The said papers were admitted in evidence and are attached hereto as part hereof marked Exhibit #37, Exhibit #38, Exhibit #39 and Exhibit 40, respectively.

Cross-examination.

By Mr. Peck:

Q. The G. V. Cutter note, \$95,000, of which you speak, at the time that that matter was ultimately compromised between the directors of the Second National Bank, who individually guaranteed it, and the Mercantile National Bank of New York, which held the Cutter note, what, if anything, was the contribution to the Second National Bank upon the settlement—in other words, what I want to get at is what the loss, if anything, to the Second National Bank was?

A. We had \$22,500.00 in New York, which they held up on account of this note, and we agreed in settlement not to press our claim for the \$22,500.00, to relinquish that, and the directors and the Mercantile paid it up between them, they each made a con-
245 cession, the Mercantile made concession, and the directors paid up a certain amount of money personally.

Q. That was the ultimate settlement of it?

A. Yes, sir.

A Juror: The Bank lost \$22,000 on that?

A. \$22,500.00.

Q. What is the condition of E. E. Galbreath at the present time, if you know, that is his condition of health.

A. Well, I only know what the papers say about him, that is all.

Mr. Peck: It has been stipulated that Mr. Galbreath is not in physical condition to come to Court and testify.

Mr. Moulinier: We are willing to do that.

(The witness leaves the stand.)

F. W. EARNSHAW, who has heretofore testified, was recalled to the stand for further Cross-examination, and testified as follows:

By Mr. Peck:

Q. Mr. Earnshaw, upon or about April 15th, 1912, at the time of your visit to Cincinnati, when the trouble occurred in the Second National Bank, you were aware of the levying of the 100 per cent assessment upon the stockholders of the Second National Bank by the Comptroller of the Currency, were you not?

246 A. Well, at that time I didn't know that it had been levied, but if they continued business it would be levied was my understanding, yes.

Q. That is that they either had to pay up 100 per cent assessment or quit business?

A. Yes, that was my understanding of it.

Q. You knew that at that time?

A. Yes.

A Juror: I would like to have Mr. Earnshaw take the stand for a minute and answer some questions. I would like to know whether there was any authorization at any meeting of your Board of Di-

rectors instructing you to make these kind of loans, or if there is anything particularly about these loans that you made and the arrangement that you made with the Second National Bank?

A. I don't know whether there is anything shown on our Minutes authorizing me to, that is the custom which we have been doing business under ever since we have started business. We made those kind of loans, and they approved them after they were made.

A. Juror: They approved the loans after they were made. They didn't instruct you to make these arrangements?

A. Well, there is nothing shows on the Minutes as to the instructions that they gave me, no.

A Juror: Was there any actual meeting where they approved the arrangement that you made as to these loans?

247 A. Where it shows on our Minutes that they approved them?

A Juror: Yes.

A. All that it will show is that the loans made since the last meeting were examined and approved, will be all.

A Juror: There is no minutes for it?

A. It does not mention any particular loan.

A Juror: No minutes by the Board—

A. That mentioned any particular loan, no.

A Juror: But they did not authorize your making this arrangement. Did they approve that afterwards at any meeting?

A. Which arrangement do you mean?

A Juror: That you made with the Second National Bank?

A. Yes, they knew the arrangements were made. I don't know what it shows on the Minutes that they were approved.

A Juror: Not specially but—

A. It was understood, the whole Board knew it.

A Juror: If the arrangement had been made with the Second National Bank to do this, why, it was not approved by the Board of Directors.

A. It is approved, but not shown on the Minutes. They knew what we were doing that. Of course it was approved if they knew it was being done. They approved all loans made that were made previous to that time.

A Juror: There is nothing shown, Mr. Earnshaw, but your Board of Directors knew that this arrangement was made, did they?

18 A. Yes.

A Juror: But it does not show on your Minutes.

A. It does not show on our Minutes that the arrangement was made.

A Juror: Or does not show on the Minutes that the loans were approved?

A. The loans were approved, yes sir.

Mr. Cash: Among others that you have submitted to your Board of Directors, were these two loans when they were made and reported to you with the Second National Bank?

A. Yes, sir.

Mr. Cash: And they approved them, among others?

A. They approved them among others.

(The witness leaves the stand.)

Thereupon the plaintiff rested.

Thereupon the Court adjourned until to-morrow afternoon, March 30th, 1915, at two o'clock, at which time a further adjournment was taken until ten o'clock, Wednesday morning, March 31, 1915, at which time a further adjournment was taken until Wednesday afternoon, March 31, 1915, at two o'clock.

Afternoon Session, March 31, 1915, at Two O'Clock.

Thereupon the defendant moved the Court that this case be taken from the jury and that the jury be instructed to return a
249 verdict for the defendant; which the Court overruled, to which ruling of the Court Counsel for defendant excepted.

Thereupon the defendant to maintain the issues upon its part, offered the following evidence, to-wit:

It is stipulated that if Stanley Ashbrook were called as a witness he would swear he was a broker in the city of Cincinnati, dealing in Second National Bank stock in 1912, and that he made the sale of the Second National Bank stock set forth upon a list marked for identification Id. I, and which is attached hereto as part hereof, upon the date and at the prices therein set forth; to which the plaintiff objects as being incompetent, and the Court sustains the objection, to which the defendant excepts.

It is agreed that if Ferdinand Jelke, Jr. one of the Counsel for the defendant, were called as a witness and sworn he would testify that he was chairman of the Stockholders' Reorganization Committee of the Second National Bank during the months of April and May, June and July, 1912, and that at the meeting of the stockholders called on or about July 7, to take action upon the question of whether or not the Bank should make an assessment of 100 per cent upon its stockholders, or liquidate and wind up the bank, the stockholders had before them the statement of the assets and liabilities of the bank, and various memoranda relating thereto, and that the present claim of the Okeana Bank did not appear upon such statement, was not before the stockholders, and was not considered; to which Coun-

sel for the Plaintiff objected, and the objection was sustained, to which ruling of the Court, Counsel for defendant excepted.

It is agreed that if W. E. Hutton were called and sworn as
250 a witness he would testify that he was a broker in the city of Cincinnati, dealing in the stock of the Second National Bank, and upon April 12, 1912, he sold 42 shares of stock of George B. Cox to E. E. Galbreath at \$200.00 a share; which was objected to by Counsel for Plaintiff and the objection sustained, to which ruling of the Court, Counsel for defendant excepted.

Mr. Peck: We want to offer the report of the Second National Bank to the Comptroller, of April 18, 1915.

Counsel for plaintiff objected, and objection was sustained, to which ruling of the Court, Counsel for defendant excepted, and makes proffer of the said report which is attached hereto as part hereof, marked Id. J.

Mr. Peck: We want to admit on the record the following part of the reply: That the said I. Doyle as alleged in the reply was an employee of the defendant bank and had no real interest in the transaction whatever, but signed said note at the suggestion and upon the request and for the accommodation of the said E. E. Galbreath.

Mr. Cash: The papers marked for identification #46, #47 and #48 are offered as exhibits without objection.

Mr. Cash: And the part furnished by Mr. Cutting after Court adjourned and which was promised, is offered as Exhibit #49, without objection.

The said paper was admitted in evidence and is attached hereto as part hereof, marked Exhibit #49.

Thereupon the defendant rested.

251 And this was all the evidence introduced or offered by the parties or either of them upon the trial of this cause.

At the conclusion of all the evidence counsel for defendant moved the Court to instruct the jury to return a verdict for the defendant, which motion was overruled, to which ruling of the court counsel for defendant then and there excepted.

Thereupon, before argument, counsel for defendant moved the Court to give to the jury the following special charges, which were submitted separately and in writing:

#1. This action is for an account of moneys which the plaintiff deposited with the defendant. The only disputed items are a charge of \$2,500.00 of December 9, 1911, for money loaned to E. E. Galbreath, and of January 5, 1912, for \$2,500.00 for money loaned upon a note signed by I. Doyle, both of which items were charged by the defendant to the plaintiff's account. If you find from the evidence that the said items were reported by the defendant to the plaintiff at or about the time of the loans in question, and that, thereafter, about the 15th of April, 1911, the plaintiff was fully informed concerning the said loans and the probable value of the collateral security thereto, and took possession of the said notes and collateral, held the same and thereafter having such full knowledge, permitted said items to remain upon its books as credits in favor of the Second

National Bank for the aforesaid amounts respectively, and
252 having such full knowledge thereafter agreed, in writing,
with the Second National Bank that the balance of account
upon the books of the Second National Bank arrived at by deducting
the said two items from the plaintiff's deposit account, agreed with
the balance between the parties as the plaintiff then stated the same
to be on its own books, the account thereby became an account stated
and is final and binding upon the plaintiff in this action.

Which special charge No. 1 the Court refused to give, to which
counsel for *for* defendant then and there excepted.

#2. If you find from the evidence that the plaintiff knew that
E. E. Galbreath was the president of the defendant bank, and that
the loans in question or either of them were for the benefit and per-
sonal interest of the said E. E. Galbreath, I charge you that the de-
fendant cannot be held liable for any fraud of the said E. E. Gal-
breath in the making of any loan to himself in which he was per-
sonally interested to the knowledge of the plaintiff.

Which special charge No. 2 the Court refused to give, to which
counsel for defendant then and there excepted.

#3. If you find from the evidence that after the bank had become
fully aware of the facts concerning the loans and the collateral securi-
ties in question, it executed a written instrument to the effect that the
account upon its books wherein the Second National Bank was
253 credited with the amount of said loans, agreed with the ac-
count between the parties as shown by the books of the Second
National Bank wherein the Okeana Bank was charged with the
amount of said loans, I charge you that the same constituted a stated
account, and is binding upon the plaintiff.

Which special charge No. 3 the court refused to give, to which
counsel for defendant then and there excepted.

#4. If you find that after the plaintiff secured full knowledge of
the facts concerning the notes and the collateral, the same were dis-
cussed at a regular meeting of the Board of Directors of the plaintiff
bank and no action thereon taken, but that the same continued to be
carried as the obligation of I. Doyle and E. E. Galbreath on the
books of the First National Bank of Okeana, and that the plaintiff
thereafter agreed in writing that the balance of account was as the
defendant claimed the same to be after deducting from the deposit
of the plaintiff in the defendant bank the amount of said loans, I
charge you that plaintiff bank thereby adopted and ratified the action
of the defendant in making the said loans upon the said collateral.

Which special charge No. 4 the court refused to give, to which
counsel for defendant then and there excepted.

#5. If you find from the evidence that the plaintiff agreed that
the account between the two banks was as stated by the defendant,
and that thereafter the stockholders of the defendant bank were

254 called upon to elect between assessing the stockholders one hundred per cent upon the par value of their stock, and winding up the bank, and you find that the stockholders elected to make the assessment having regard to the assets and liabilities of the bank as the same then appeared, the plaintiff is now estopped to assert any other or greater balance as due it from the defendant than that so agreed due as aforesaid.

Which special charge No. 5 the court refused to give as asked, to which counsel for defendant then and there excepted.

#6. You are instructed to return a verdict for the defendant in this case.

Which special charge No. 6 the Court refused to give as asked, to which counsel for defendant then and there excepted.

255 Thereupon after argument the Court charged the jury as follows:

Gentlemen of the Jury:

The pleadings in this case you will take with you to the jury room for perusal, examination and reference, but as they have not been read to you it may help to an understanding of the issues to read them at this time.

The plaintiff in its petition says: "Plaintiff and defendant are both banking associations organized under the laws of United States of America. The plaintiff doing business and located at Okeana, Ohio, and the defendant at Cincinnati, Ohio. A long time prior to the ninth day of December, 1911, and thereafter to the date of demand hereafter specified, the plaintiff kept a balance with the defendant, such as is kept by country banks, such as the plaintiff, with banks in large reserve cities, like the defendant. And as part of such business arrangement, and in consideration thereof, the defendant agreed to perform such service as such city banks perform for such country banks, and especially the loaning of surplus funds in its hands belonging to the plaintiff, upon demand loans secured by adequate collateral for the plaintiff and account to it for the same and interest. That on or about December 9, 1911, the defendant had the sum of five thousand dollars (\$5,000) belonging to the plaintiff to be so loaned, and plaintiff directed the defendant to procure such loans to said amount. On the 22nd day of July, 1912, plaintiff demanded of the defendant the repayment to it of said five thousand dollars and interest, which the defendant declined and refused to do. Therefore the plaintiff prays judgment against defendant in the sum of five thousand dollars together with interest thereon from the 9th day of December, 1911, and for an accounting by the defendant of the transactions above specified, and for all other relief to which the plaintiff may be entitled."

256 The defendant in its answer says:

"The Second National Bank of Cincinnati, Ohio, admits that plaintiff and defendant are both banking associations organized

under the laws of United States — America, plaintiff doing business and located in Okeana, Ohio, and defendant at Cincinnati, Ohio.

"The Second National Bank of Cincinnati, further admits that the plaintiff kept a balance with the defendant at the times mentioned in the petition.

"The defendant denies that as part of such business arrangements and in consideration thereof it agreed to perform such services as City banks perform for Country banks and especially the loaning of surplus funds in its hands belonging to plaintiff as alleged in its petition.

"Defendant says that it undertook to loan surplus funds in its hands belonging to plaintiff for and on behalf of plaintiff and solely for the accommodation of plaintiff and that it received no consideration whatever for performing such services. The defendant admits that on or about December 9th, it had five thousand dollars belonging to plaintiff to be so loaned and that the plaintiff directed defendant to procure such loan to said amount.

"The defendant alleges that it did on or about December 9th, 1911, loan the sum of twenty-five hundred dollars of the
257 money belonging to plaintiff as above alleged and that this loan was thereafter submitted to the plaintiff and in all ways fully approved of, confirmed and ratified by said plaintiff. Defendant alleges that it did again on January 5, 1912, loan twenty-five hundred dollars of the money belonging to the plaintiff as hereinabove alleged and that this loan too was thereafter in all respects fully ratified and approved of by the plaintiff.

"This defendant denies that the plaintiff demanded a repayment of said five thousand dollars and interest on the 22nd day of July, 1912, or at any time, and this defendant says that the plaintiff did on August 8th, 1912, withdraw all money or credits which money or credits were situated at the Second National Bank.

"Wherefore this defendant prays that it may be dismissed hence with its costs herein expended."

The plaintiff in its amended reply says:

"That on the 9th day of December, 1911, and prior thereto, E. E. Galbreath was the president of the defendant bank, and that at the said time did conspire with him to defraud the plaintiff; that at the said time, as well as on the 12th day of January, 1912, it did conspire with him to defraud the plaintiff of the sum of five thousand dollars, and that in pursuance of the said conspiracy did wrongfully deliver to him on the 9th day of December, 1911, the sum of twenty-five hundred dollars taking therefor a note payable and endorsed by the said E. E. Galbreath, pretended to be secured by fifteen shares of the capital stock of the said defendant, then and there held by him; and thereafter, on the 5th day of January, 1912, and in
258 pursuance of the said conspiracy, did wrongfully deliver to him the sum of twenty-five hundred dollars, taking therefor a note payable and endorsed by one I. Doyle; that the said I. Doyle was an employe of the defendant bank, and had no real interest in the transaction whatever, but signed said note at the suggestion and upon the request and for the accommodation of the said E. E. Gal-

breath; that the said E. E. Galbreath pretended the said note to be secured by twelve shares of the capital stock of the defendant, which was then and there held by the said E. E. Galbreath, and thereby the defendant did at the times and in the manner aforesaid appropriate from and charge against the deposit account of the plaintiff the sum of five thousand dollars; that at the said times, and each of them as aforesaid, the said E. E. Galbreath was insolvent, and that the said shares of stock were worthless, all of which facts the defendant knew at that time, but which said facts were not known to the plaintiff, and could not have been known to it by even the highest degree of diligence.

259 "Plaintiff further says that on or about the 11th day of January, 1911, and thereafter during said year 1911, the defendant published to the world and delivered to the plaintiff sworn statements of its financial condition, from which it appeared that the said defendant's stock was worth more than two hundred dollars per share in value, and upon such statement it was intended by the defendant that the plaintiff should, and upon which the plaintiff did rely in its dealings with the defendant, but which statement was false and was known by the defendant to be, and its stock was then worthless and was known by the defendant to be, and that at the time of the making of the said loans, as aforesaid, to the said E. E. Galbreath, and the appropriation of the said moneys from the plaintiff's deposit accounts, as aforesaid, and the taking of the said stock as security, the defendant's bank shares were valueless, and that ———, the bank examiner appointed by the United States Comptroller of the Currency, had in the discharge of his duties as examiner, reported to the said Comptroller the fact of the depreciation of the assets of said bank, which depreciation, as reported, subsequently, would be at the par value of said stock, and reduced the par value of said stock to nothing; that the said Comptroller had notified the said defendant bank that unless said depreciation of assets were removed, and its full value replaced, he would be compelled to take such steps as to enforce the liquidation of the said bank; that the execution of said threat on the part of the Comptroller was, at the instance of the said defendant, stayed until the 8th day of April, 1912, and that on the 9th day of December, 1911, as well as on the 5th day of January, 1912, said defendant and said Galbreath, its president, with intent to defraud and deceive the plaintiff, did conceal and withhold from the plaintiff that said Galbreath was insolvent, and that the said stock was worthless, and that said Comptroller had taken the action as hereinbefore described, all of which was well known to the defendant, as aforesaid, and did thereby deceive and delude the plaintiff into accepting and approving the said loans, as aforesaid, to the said E. E. Galbreath.

260 "Plaintiff further says that said Galbreath has ever since the 9th day of December, 1911, been insolvent and been unable to pay said loans, and that the stock pledged by him, as aforesaid, has ever since been worthless, and that by said deception the defendant fraudulently diverted from the plaintiff a fund on deposit, as aforesaid, in the sum of five thousand dollars, with a

fraudulent intent to deprive it of said sum, and that it did in fact fraudulently deprive the plaintiff of said sum, to its damage in the sum of five thousand dollars."

It appears by the evidence in this case that on the 9th day of December, 1911, the Okeana National Bank, the plaintiff here, had certain moneys on deposit with the Second National Bank at Cincinnati; that on that day E. E. Galbreath, who was at that time President of the Second National Bank, executed his demand note to the order of the Okeana National Bank and attached thereto as collateral eleven shares of the capital stock of the Second National Bank owned by Galbreath and standing in his name; that \$2,500.00 of the money of the Okeana Bank on deposit with the Second National Bank at that time was paid to Galbreath or transferred to him, and a communication was sent to the Okeana National Bank. The communication referred to is Exhibit # 6 in this case, and omitting the printed heading, the communication reads as follows:

"First National Bank, Okeana, Ohio.

We charge your account with \$2,500.00 in payment of demand loan taken as directed in your favor of — inst. and filed note and collateral listed below subject to your future orders."

Maker, E. E. Galbreath. Rate 5% from this date.

Collateral, 11 shares Second National Bank.

Yours very respectfully,

J. G. GUTTING, *Cashier.*"

261 On January 5, 1912, a similar note in favor of the Okeana National Bank was signed by I. Doyle and the deposit of moneys in the name of the Okeana National Bank with the Second National Bank was similarly drawn upon in payment of the I. Doyle note. A communication of the same form was sent to the Okeana National Bank of the same tenor as the notice above referred to, except that this communication was dated January 5, 1912, and the name of the maker was given as I. Doyle and the statement of collateral as 12 shares Second National Bank stock. This communication which is Exhibit #7 in this case concludes "Yours very respectfully, J. G. Gutting, Cashier."

It is admitted in this case that the I. Doyle referred to in the communication I have just described was an employee of the Second National Bank and had no real interest in the transaction whatever, but signed said note at the suggestion and upon the request and for the accommodation of the said E. E. Galbreath. The phrase "for the accommodation of" may be translated "for the benefit of"; and it is not disputed that E. E. Galbreath received the money paid to purchase the so-called Doyle note. It is clear upon the evidence in the case that the Okeana National Bank, when it received the communication stating the purchase of the so-called Galbreath note, that is to say, the first one above referred to, the Okeana Bank, knew that the maker of the note, E. E. Galbreath, was an officer and president of the Second National Bank. It does not appear that the Okeana

National Bank knew the identity of I. Doyle at the time it received the communication stating the purchase of the I. Doyle note.

262 I will now take up with you the claims of the respective parties in this case. The plaintiff claims that early in the year 1911 an agreement was entered into between the Okeana National Bank and the Second National Bank whereby the Okeana National Bank undertook to open an account and keep a deposit account with the Second National Bank, and the Second National Bank, in consideration of having the Okeana's deposit account opened with it, agreed to pay $2\frac{1}{2}\%$ interest on average balances in the deposit account, and also from time to time at the request of the Okeana Bank to make for it, the Okeana Bank, call loans secured by adequate collateral. By call loans are meant, of course, loans of money which the borrower undertakes to repay on demand, and by collateral is meant security given by the borrower to the lender to make good the borrower's obligation. The ordinary form of collateral is that of bonds or stocks, so endorsed or signed by the owner that a person into whose hands they rightfully come may sell them or realize upon them their value.

Upon the plaintiff, who alleges such an agreement to have been entered into, rests the burden of proving such an agreement, and as it is a contract which the plaintiff is called upon to prove, his proof must go to the essentials of a contract, namely, the meeting of the minds of both parties upon the same subject matter, and the terms of obligations resting upon each to be performed with reference to such subject matter and to show the consideration for the agreement moving from one party to the other. The consideration may

263 consist in the mutual obligations undertaken by the parties. I will say to you, however, that the existence of such a contract between the parties, if you find a contract to have been established upon the evidence, of the kind and in the terms claimed, will be considered by you only as bearing upon the relations existing between the two banks at the time of the making of the so-called Galbreath and Doyle loans. Whether or not you find such a contract to have been entered into, you will nevertheless have to consider at the outset of your deliberations the relation existing at such a time, (that is, the time of the making of the loans), between the two banks. It is established by the evidence in the case that, at the time the Galbreath and Doyle notes were made and the money of the Okeana Bank paid therefor, the Okeana Bank had requested the Second National Bank to make call loans for it, and the Second National Bank had undertaken so to do. By reason of the Second National Bank undertaking to make such loans at the request of the Okeana National Bank, there arose between the parties the relation of principal and agent, that is to say, a relation wherein the Second National Bank was undertaking to perform the business of the Okeana Bank in making loans. One of the elements arising from this relation is the obligation upon the agent, here the Second National Bank, to perform the business of the agency, in this case the making of call loans upon collateral, with such care and such good faith as the rela-

relationship demanded, and if, upon the evidence in this case, you find that the relationship arose from the contract between the
 264 banks made for a consideration moving from the Okeana Bank to the Second National Bank, such finding of fact will be an element for your consideration in determining the duty of the Second National Bank in the premises.

In the case thus supposed, that of a contract between the parties the Second National Bank would owe to the Okeana Bank the duty to exercise ordinary care, having in view the nature of the business to inquire into and ascertain the adequacy of the collateral presented upon such call loans. Again in the case supposed, (still assuming that you should find a contract, which, however, it is entirely for you to determine upon the evidence), it was the duty of the Second National Bank assuming to act as agent to communicate to its principal, the Okeana National Bank, any matter connected with the making of the loan and the adequacy of the collateral materially affecting the loan and its security.

If the Second National Bank assuming to loan the moneys of the Okeana National Bank upon the latter's request did so merely as an accommodation and convenience to the Okeana Bank, and without consideration moving to the Second National Bank, the Second National Bank would nevertheless be under the duty of exercising such care with respect to receiving adequate collateral as in view of the nature of the business would be exercised by ordinarily prudent persons in the banking business acting for others without pay and as a mere accommodation. And, under the state of facts last assumed, that is in the absence of a contract, the Second National Bank acting, if it did so act, gratuitously, and for the convenience
 265 of the Okeana Bank, would likewise be under the duty of communicating to its principal, the Okeana Bank, knowledge of which it might have in respects materially affecting the business of the loan and materially affecting the sufficiency of the collateral security.

Now, having thus in mind the relation existing between the parties you will observe that the defendant's answer denies that the Second National Bank made such agreement with the Okeana National Bank as I have referred to, and states that it did undertake to loan the Okeana's funds on deposit with it for the accommodation of the Okeana Bank and for no consideration whatever. By reason of the defendant's denial of the plaintiff's claim of an agreement, the burden is upon the plaintiff to establish such agreement, and the burden is that which I have already defined, or may hereafter define, namely, by a preponderance of the evidence.

The defendant's answer further alleges, however, that on December 9th, 1911, it did loan \$2,500.00 of the plaintiff's money and that this loan was submitted to the plaintiff and in all ways fully approved of, confirmed and ratified by the plaintiff, and that on January 5, 1912, it again loaned \$2,500.00 of the plaintiff's money and this loan, too, was in all respects fully ratified and approved of by the plaintiff.

As I have already stated, it is established by the evidence that the two loans referred to in defendant's answer were made, one being

the so-called Galbreath loan and the other being the so-called Doyle loan, and that the making of such loans was communicated to the Okeana National Bank. It also appears in evidence, and is undisputed, that such loans were approved by the Okeana National Bank, acting through its Board of Directors.

The plaintiff, however, claims that at the time each of these two loans was made and at the time the making of the loans was approved by the Okeana National Bank, it relied entirely upon the security or sufficiency of the collateral attached to the Galbreath and Doyle notes; that at the time the loans were made and at the time they were ratified the Second National Bank knew that this collateral stock of the Second National Bank was worthless and that the Okeana Bank did not know this; that by reason of this state of affairs which the plaintiff claims to have existed, the Second National Bank failed in the duty which the plaintiff claims rested upon it (the Second National Bank) to disclose to the Okeana Bank the true value of the Second National's own stock. The plaintiff claims that the defendant, the Second National Bank, with intent to defraud and deceive the plaintiff did conceal and withhold from the plaintiff that the said stock was worthless, notwithstanding this alleged fact was well known to the Second National Bank, and that the latter also concealed the knowledge which it is charged to have had that the Comptroller of the Treasury had reported to the Second National Bank a depreciation in the assets of the bank. These being the plaintiff's claims, the plaintiff has the burden of proof of establishing such claims. The defendant has not filed any pleading denying the claims of the plaintiff's reply for the reason that our law does not permit further pleadings after a reply. I may therefore

say to you at this point that the allegations of the plaintiff's reply, and by this I mean the amended reply, are to be taken as denied by the defendant. The defendant, however, does not deny that the I. Doyle referred to was an employee of the defendant Bank and had no real interest in the transaction, but signed the said note at the suggestion and upon the request and for the accommodation of the said E. E. Galbreath. The burden of proof, therefore, is upon the plaintiff, the Okeana National Bank, to establish that the defendant Bank, the Second National Bank, represented its stock was worth more than \$200.00 per share; that such representation was made by the Second National Bank to the Okeana National Bank with the intention on the part of the Second National Bank that the Okeana National Bank should rely thereon; that the plaintiff, the Okeana National Bank, did rely on such representations; that such representations were false and were known by the Second National Bank to be false when made and that by reason of these facts, if they should be found to be facts, the Okeana National Bank suffered loss. These elements of proof resting upon the plaintiff to establish by a preponderance of the evidence in this case are to be determined by you with reference to the time when the respective loans were made, that is to say, at the time the Galbreath loan was entered into and again at the time the Doyle loan was entered into.

I now direct your attention to the evidence to be considered by you in connection with the plaintiff's allegations and the elements of

proof resting upon the plaintiff to establish. With respect to the representations of the bank, this evidence is that of statements of financial condition of the bank published in Cincinnati newspapers,—statements touching the finances of the bank, and correspondence and communications sent by the Second National Bank to the Okeana National Bank and financial statements alleged to have been sent by the Second National Bank in the course of mail to the Okeana National Bank. There is no dispute that the publications in the newspapers of the financial statement of the Second National Bank were made by the Second National Bank, and it is chargeable with making them. Such reports so published in the newspapers are made in pursuance of the law governing National Banks, but their purpose is also that of conveying information to those persons who contemplate dealing with the bank in which its financial condition enters as an essential. If you should find, by a preponderance of the evidence, that these statements, or other statements which were communicated directly to the Okeana Bank, if there were such statements so communicated, were read by the Okeana Bank acting through its officers, and that the Okeana Bank did rely thereon, and was justified under the circumstances in so relying, the Second National Bank would be responsible for loss directly resulting to the Okeana Bank by reliance upon such statements or communications, if such statements or communications were in fact false at the time they were made and were known by the Second National Bank to be false, and were intended to be acted upon.

As to the question of whether or not such statements, or any of them, were intended by the Second National Bank to be acted upon, that among others is an element of proof incumbent upon plaintiff to be considered by you, and in its consideration you will take into account all of the facts appearing in evidence as to how and in what form the representations were made, the truth or falsity thereof, and the knowledge or want of knowledge of the Second National Bank, through its officers or agents, of the falsity of the representations, if, in fact, false when made, and in connection with these elements all other matters and circumstances disclosed in evidence.

At this point I may say to you that it is not in all cases necessary that a representation of value be express. Where a confidential relation exists between parties, one of whom is acting for or in behalf of another, there may be and in certain cases there does arise a duty on the part of the former to disclose or communicate to the latter material facts which the former is in good faith bound to disclose. Whether in the present case the relation of the Second National Bank to the Okeana Bank was of such confidential character with respect to the lending of the latter's funds, and if so whether the knowledge of the Second National Bank, if knowledge it had of the true value of its stock at the time of making these loans, was such as to require of the Second National Bank the disclosure of such knowledge, are questions of fact for the determination of the jury in the light of all the evidence. As I have said to you, the burden is upon the plaintiff to establish that at the time of the making

the Galbreath loan or the Doyle loan or either of them, the value of the Second National Bank stock was materially less than represented by the Second National Bank, and that at such time the Second National Bank knew that the stock had a value substantially less. Upon the question of the value of the stock at the time 270 the loans referred to, or either of them were made, you may take into consideration all that the evidence shows as to the true value of such stock at that time or at times shortly before and after that time. You may also take into consideration any action on the part of the Board of Directors of the Second National Bank at or about the time referred to, in fixing the value or charging off from the value of the assets held by it, in so far as such assets entered into the true value of the stock at the time the Galbreath and Doyle loans were made.

Upon the issue of the knowledge, if any, of the Second National Bank as to the true value of its capital stock at the time the Galbreath and Doyle loans were made, you may take into consideration the action of the Board of Directors of the Second National Bank with respect to the assets of the bank at times shortly preceding the making of the two loans referred to, and you may also take into consideration the letter of the Comptroller of the Treasury under date of March 4, 1911, to the Second National Bank with respect to the affairs of that bank. I will say to you, however, that this letter of the Comptroller of March 4, 1911, referred to sometimes as the Kane letter, Kane being the Deputy Comptroller who signed the letter, is not to be taken by you as evidence of the actual condition of the finances and assets of the Second National Bank, but is to be considered only in so far as it may tend to throw light upon the knowledge of the Second National Bank as to its true financial condition and the true value of its stock at the time the Galbreath and Doyle loans were made.

271 With respect to the evidence as to the market value of the stock of the Second National Bank and with respect to purchases of such stock by the officers of the Second National Bank at any time prior to the making of the Galbreath and Doyle loans or at any time thereafter, I will say to you that such evidence is to be considered by you as bearing upon the good faith of such officers of the Second National Bank with respect to the representations above referred to, and as bearing upon the knowledge of the Second National Bank and its officers of the real financial condition of the bank. If the financial condition of the Second National Bank at the time the two loans were made was such as to make the true value of its stock materially less than that represented, and if the bank, through its officers, knew of such condition and nevertheless represented the stock to be of a value materially in excess of its true value, then in such state of facts, if you should so find them, the market value of the stock or the prices paid for the stock by officers of the Second National Bank is of no weight whatsoever.

Moreover, if you should find that false statements of the Bank's financial condition and of the value of its stock were made by the Bank through its officers and agents, and that such statements were made by the officers and agents of the Second National Bank in its

behalf as statements of fact which they did not know to be fact, or if such statements were in fact false and made recklessly and without regard to whether they were in fact false or true, then such false statements will be of the same effect so far as the responsibility of the Bank is concerned as if made with knowledge of their falsity.

272 At this point I will say to you that the Second National

Bank is not responsible in this case for any representations or acts of concealment as to the financial responsibility of E. E. Galbreath or I. Doyle. The responsibility of the Second National Bank, if it is responsible in this case upon the evidence and under the rules of law given you, extends only to the sufficiency or adequacy of the collateral attached to the loans in question. In speaking of the Second National Bank, its acts and its knowledge and intent, you will understand that I have reference to its acts through its officers and agents. And the same observation applies where I have spoken of the Okeana National Bank. Both banks acted through agents, these agents themselves acting within the scope of their authority; and the Second National Bank, in its dealing with the Okeana National Bank, is bound by and is responsible for acts done by its officers and agents within the apparent scope of their authority, unless the Okeana Bank knew or, in the exercise of ordinary intelligence and care, should have known that some or any of the acts of the Second National Bank's officers were in excess of these agents' authority, if such was the case. One may rightfully deal with a corporation through its agents within the limits of such agents' real authority to act, and if their real authority is not known then within the limits of their apparent authority. The Second National Bank in its dealings with the Okeana Bank is not responsible in this case for any act of any officer in excess of or outside his apparent authority, nor for any act of any officer in excess of or outside his real authority, 273 if such real authority was known to the Okeana Bank or should have been known to it in the exercise of reasonable diligence.

If upon the evidence you should find that the shares of capital stock of the Second National Bank were, at the time of the Galbreath and Doyle loans, worth substantially what they were represented to be by the financial statements issued by the Second National Bank, or if you find that the shares of the Second National Bank stock were not worth what they were represented but that the Second National Bank acting through its officers and agents did not know that the Second National Bank stock was worth less than represented, or if you should find that the plaintiff bank did not rely upon such representations as were made, then in either such case your verdict will be for the defendant.

I have spoken of the element of proof that the plaintiff relied upon such statements as you may find to have been made. In this connection it must appear not only that the Okeana Bank relied on the sufficiency of the collateral, but that under all the circumstances it was justified in so doing. On this score, therefore, you

will consider whether a banker of ordinary intelligence and prudence, situated as was the Okeana Bank, and standing in its relation to the Second National Bank, as that relation appears from the evidence, would have relied upon the representations made.

I have already indicated the elements of burden of proof incumbent upon the plaintiff to establish in order to recover in this action.

When I have spoken to you of the requirements of proof
274 or when I have used the phrase "to establish," or similar language, you will understand that I have reference to the measure of proof incumbent upon a party in a civil action seeking a verdict by reason of claims made. This burden of proof is always that of proving the claims made by a preponderance of the evidence, determined not necessarily by the number of witnesses produced by one side or another of an issue of fact but determined rather by the probative value and convincing effect of the testimony offered and the evidence introduced. The evidence preponderates as to any issue of fact to the side of that party whose evidence as to such issue of fact outweighs the evidence offered by the opponent. As to any issue of fact the evidence preponderates to the side of that party to the case whose evidence viewed in the light of all the evidence in the case and fairly and impartially weighed, is appreciably stronger or more convincing to your minds as to its truth and probability than the evidence offered in opposition thereto. If as to any issue of fact the evidence is evenly balanced, there is, of course, no preponderance, and the party having the burden of proof as to such issue would fail.

I may also say at this point, if I have not already done so, that the burden is upon the plaintiff in this case to show the extent of his damage or loss and to show that such damage, if any he has suffered, is the proximate result of reliance upon its part upon the representations which were false in fact and known by the defendant to be false.

If upon the evidence and under the law as stated to you, you should find for the plaintiff, you will then determine the
275 amount of its damage. Plaintiff is entitled to recover, if entitled to an award at your hands, of a sum found by taking the difference between the amount of each loan when the same was made and the true value of the collateral (the Bank stock attached to the note) at such time. Upon the amount so found in the case of each separate loan, you will add simple interest at the rate of 6% per annum from the 1st day of February, 1912 (interest to that date having been paid), until the first day of this term of Court, March 1st, 1915. If in any award you may make you compute interest your verdict will be in a single sum inclusive of interest, if you award interest.

I have given the rule of damages as the difference between the face amounts of the respective notes, which together are the amounts of the deposit of \$5,000.00, and the real value of the collateral attached to each note at the time the loan was made. If you find for the plaintiff you will follow this rule, unless you should further find that, after the loans were made in December, 1911, and Jan-

uary, 1912, and until the time in April, 1912, when the Comptroller took official action with respect to the affairs of the Second National Bank, the collateral depreciated or fell in value, that is, between December and January and the date somewhere about the middle of April the collateral depreciated or fell in value between those dates, and that the Second National Bank at the time the loans were made had such knowledge of its own condition that it should have contemplated such subsequent depreciation, if any there was. Should you so find, the Second National Bank would be responsible to the Okeana Bank for depreciation in value of the collateral within the period mentioned. It would not be

276 responsible should you find the facts otherwise.

You, gentlemen of the jury, are the sole judges of every question of facts in this case. Upon every issue and question of fact yours is the sole responsibility, and the Court has no province with respect to any issue of fact. Your determination of the facts will, as I have said before, be made in the light of the rules of law that I have given you.

It is also your province to pass upon and determine as to the weight of the evidence in the case, or as to any part of the evidence, and likewise to determine what weight and measure of belief you will attach to the testimony of any witness in the case.

Your verdict in this case will be reached upon the agreement upon a verdict of nine or more of your number. Those of you who agree upon the verdict reached by that number, nine or ten or eleven or twelve, will sign the verdict. Those who do not agree need not sign. When you have reached a verdict, it will be signed, as I have indicated, and you will return it into court. You will take with you to the jury room the pleadings in the case and the exhibits.

Mr. Forcheimer: We want a general exception and in addition thereto an exception because none of the matters mentioned in our special charges were covered or touched upon by the general charge of the Court, and further that by the general charge of the Court we are deprived of a title right and privilege or immunity under the laws and statutes of the United States.

Counsel for plaintiff excepted generally to the charge as given.

277 Whereupon the jury retired and returned a verdict for the plaintiff as appears of record herein.

Whereupon afterwards, and within three days, the defendant, by its counsel, filed a motion to set aside said verdict and for a new trial, which, after consideration, the Court overruled, to which ruling of the Court defendant, by its counsel, then and there excepted.

And now comes the defendant, by counsel, and tenders this its bill of exceptions, the same having been filed with the Clerk of the Court on the — day of —, A. D., 1915, being within forty days after the overruling of the motion for a new trial, and prays that the same be allowed, settled, signed, sealed, and made a part of the record in this cause, which is accordingly done.

Witness the hand and seal of this Court this 2nd day of July,
A. D. 1915.

STANLEY W. MERRELL,
Judge Superior Court of Cincinnati.

278 C. H. Davis, President.
Wm. Albert, Vice President.
E. E. Galbreath, Vice President.
G. W. Williams, Cashier.
J. G. Gutting, Ass't Cashier.
R. V. Johns, Ass't Cashier.

Second National Bank.

Original Charter No. 32.

Capital, \$1,000,000. Surplus, \$1,000,000.

CINCINNATI, Jan. 11, 1911.

Mr. F. W. Earnshaw, Cashier First National Bank, Okeana, Ohio.

DEAR MR. EARNSHAW: Your favor of the 9th enclosing your draft for \$15,000 received, which we have placed to your credit.

Yesterday being our Annual Election Day, my time was so taken up I did not get a chance to write and thank you for the account. I assure you we appreciate it very much, and shall try and do our part to make the connection a satisfactory one.

We will place the \$12,000 on call for you tomorrow.

I am pleased to announce that I was elected President of the Second National Bank on yesterday.

I shall write you tomorrow regarding the Indiana Gravel Road bonds.

With kindest personal regards, I am,

Yours very truly,

E. E. GALBREATH, *President.*

279

Ex. #2.

No. 1334.

Pay to the order of Second Nat'l Bank, Cinti., O. \$15,000.00
Fifteen Thousand & no/100. Dollars

FIRST NATIONAL BANK,
F. W. EARNSHAW, *Cashier.*

Okeana, Ohio, Jan. 9, 1911.

Cincinnati, Ohio, First National Bank.

Ex. #2.

282

Ex. #5.

Office of Comptroller of the Currency.

Address Reply to "Comptroller of the Currency."

TREASURY DEPARTMENT,
WASHINGTON, Jan. 13, 1911.

0-9450.

Cashier First National Bank, Okeana, Ohio.

SIR: As requested in your letter of the 10 inst., the following named association is hereby approved as a depository for a portion of the lawful money reserve of your bank:

Second National Bank, Cincinnati, Ohio.

Respectfully,

THE COMPTROLLER OF THE CURRENCY.

283

Ex. #5, ENVELOPE.

TREASURY DEPARTMENT
Office of Comptroller of the Currency.OFFICIAL BUSINESS

Return after Five Days.

Washing-
ton, D. C.
Jan. 13
6:30 PM
1911Penalty
for Pri-
vate use
\$300

THE FIRST NATIONAL BANK,

Okeana,

Ohio.

Ex. #5.

284

Ex. #6.

E. H. Davis, President; Wm. Albert, Vice-President; C. E. Galbreath,
Vice-President; G. W. Williams, Cashier; R. V. Johns, Assistant
Cashier; J. G. Gutting, Assistant Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$1,000,000.00.

\$1,000,000 Surplus.

CINCINNATI, O., Dec. 9, 1911.

First National Bank, Okeana, Ohio:

We charge your account with \$2,500.00 in payment of demand
loan taken as directed in your favor of the — inst. and file note
and collateral listed below, subject to your future orders.

Maker, E. E. Galbreath. Rate, 5 per cent from this date.
Collateral, 11 shares Second Nat'l Bank.

Yours very respectfully,

J. G. GUTTING, *Cashier*.

#650.

Ex. #6.

285

Ex. #7.

E. H. Davis, President; Wm. Albert, Vice-President; C. E. Galbreath, Vice-President; G. W. Williams, Cashier; J. G. Gutting, Ass't Cashier; R. V. Johns, Ass't Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$1,000,000.00.

\$1,000,000 Surplus.

CINCINNATI, O., Jan. 5, 1912.

First National Bank, Okeana, Ohio:

We charge your account with \$2,500.00 in payment of demand loan taken as directed in your favor of the — inst. and file note and collateral listed below, subject to your future orders.

Maker, I. Doyle. Rate, 5 per cent from this date.

Collateral, 12 shares 2nd Nat'l Bank stock.

Yours very respectfully,

J. G. GUTTING, *Cashier*.

#681.

Ex. #7.

286

Ex. #8.

E. H. Davis, President; Wm. Albert, Vice-President; C. E. Galbreath, Vice-President; G. W. Williams, Cashier; J. G. Gutting, Ass't Cashier; R. V. Johns, Ass't Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$1,000,000.00.

\$1,000,000 Surplus.

CINCINNATI, O., Jan. 12, 1911.

First Nat'l Bank, Okeana, O.:

We charge your account with \$2,000.00 in payment of demand loan taken as directed in your favor of the 11 inst. and file note and collateral listed below, subject to your future orders.

Maker, A. A. Hackman. Rate, 5 per cent from this date.
Collateral, 250 sh. Batesville (Ind.) Bank.

Yours very respectfully,

G. W. WILLIAMS, *Cashier*.

#359.

Ex. #8.

287

Ex. #9.

C. H. Davis, President; Wm. Albert, Vice-President; E. E. Galbreath,
Vice-President; G. W. Williams, Cashier; J. G. Gutting, Assis.
Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$500,000.00.

Surplus, \$500,000.00.

CINCINNATI, O., Mar. 8, 1911.

First National Bank, Okeana, O.:

We credit your account with principal and interest on call loan
as listed below.

Maker, R. Telker, principal.....	\$2,300
9 days interest at 4½ per cent.....	\$2.60
26 days interest at 4 per cent.....	\$6.64
Total.....	<u>\$2,309.24</u>

Yours very respectfully,

G. W. WILLIAMS, *V. P.*

Ex. #9.

Form 56.

288

Ex. #10.

C. H. Davis, President; Wm. Albert, Vice-President; E. E. Galbreath, Vice-President; G. W. Williams, Cashier; J. G. Gutting, Ass't Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$500,000.00.

\$500,000.00 Surplus.

CINCINNATI, O., Feb. 1, 1912.

First Nat. Bank, Okeana, O.:

The rate of interest on your call loans listed below will be 4½ per cent. from this date.

Maker, All Loans.	\$—.	Maker, — — —.	\$—.
Maker, — — —.	\$—.	Maker, — — —.	\$—.
Maker, — — —.	\$—.	Maker, — — —.	\$—.
Maker, — — —.	—.	Maker, — — —.	\$—.

Yours very respectfully,

R. TELKER, JR., *A. Cashier.*

Ex. #10.

Form 60.

289

Ex. 11.

C. H. Davis, President; Wm. Albert, Vice-President; E. E. Galbreath, Vice-President; G. W. Williams, Cashier; J. G. Gutting, Ass't Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$500,000.00.

\$500,000.00 Surplus.

CINCINNATI, O., Sept. 25, 1911.

First Nat'l Bank, Okeana, O.:

The rate of interest on your call loans listed below will be 4½ per cent. from this date.

Maker, All Loans.	\$—.	Maker, — — —.	\$—.
Maker, — — —.	\$—.	Maker, — — —.	\$—.
Maker, — — —.	\$—.	Maker, — — —.	\$—.
Maker, — — —.	—.	Maker, — — —.	\$—.

Yours very respectfully,

R. TELKER, JR., *A. Cashier.*

Ex. #11.

Form 60.

290

Ex. #12.

C. H. Davis, President; Wm. Albert, Vice-President; E. E. Galbreath,
Vice-Pres.; G. W. Williams, Cashier; J. G. Gutting, Ass't Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$500,000.00.

\$500,000.00 Surplus.

CINCINNATI, O., Oct. 18, 1911.

First Nat'l Bank, Okeana, Ohio:

The rate of interest on your call loans listed below will be 5 per
cent. from this date.

Maker, On all loans.	\$_____.	Maker, _____.	\$_____.
Maker, _____.	\$_____.	Maker, _____.	\$_____.
Maker, _____.	\$_____.	Maker, _____.	\$_____.
Maker, _____.	_____.	Maker, _____.	\$_____.

Yours very respectfully,

R. TELKER, JR., *A. Cashier.*

Ex. #12.

Form 60.

291

Ex. #13.

E. H. Davis, President; Wm. Albert, Vice-President; C. E. Galbreath,
Vice-Pres.; G. W. Williams, Cashier; J. G. Gutting, Ass't Cashier;
R. V. Johns, Ass't Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$1,000,000.00.

\$1,000,000.00 Surplus.

CINCINNATI, O., June 24, 1911.

First Nat'l Bank, Okeana, Ohio:

We charge your account with \$1,000.00 in payment of demand
loan taken as directed in your favor of the — inst. and file note and
collateral listed below, subject to your future orders.

Maker, W. M. Perin. Rate 4 per cent from this date.
Collateral, 26 sh. The Brownell Co. Com.

Yours very respectfully,

J. G. GUTTING, *Cashier.*

Ex. #13.

#503.

[Stamped across face:] Paid. Feb. 29, 1912. First National
Bank, Okeana, Ohio.

292

Ex. #14.

C. H. Davis, President; Wm. Albert, Vice-President; E. E. Galbreath, Vice-Pres.; G. W. Williams, Cashier; J. G. Gutting, Ass't Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$500,000.00.

\$500,000.00 Surplus.

CINCINNATI, O., Mar. 1, 1912.

First National Bank, Okeana, Ohio:

We credit your account with Principal and Interest on call loan as listed below.

Maker, Floyd Day, principal.....	\$2,500.00
28 days interest at 4½ per cent.....	8.75
1 days interest at 4 per cent.....	.28
Total.....	<u>\$2,509.03</u>

Yours very respectfully,

J. G. GUTTING, *Cashier.*

Ex. #14.

Form 56.

293

Ex. #15.

C. H. Davis, President; Wm. Albert, Vice-President; E. E. Galbreath, Vice-President; G. W. Williams, Cashier; J. G. Gutting, Ass't Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$500,000.00.

\$500,000.00 Surplus.

CINCINNATI, O., Mar. 1, 1912.

First National Bank Okeana, Ohio:

We credit your account with principal and interest on call loan as listed below.

Maker, W. M. Perin, principal.....	\$1,000.00
28 days interest at 4½ per cent.....	3.50
1 days interest at 4 per cent.....	.11
Total.....	<u>\$1,003.61</u>

Yours very respectfully,

J. G. GUTTING, *Cashier.*

Ex. #15.

Form 56.

294

Ex. #16.

C. H. Davis, President; Wm. Albert, Vice-President; E. E. Galbreath, Vice-Pres.; G. W. Williams, Cashier; J. G. Gutting, Ass't Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$500,000.00.

\$500,000.00 Surplus.

CINCINNATI, O., Mar. 1, 1912.

First National Bank, Okeana, Ohio:

We credit your account with principal and interest on call loan as listed below.

Maker, Geo. W. Black, principal.....	\$2,500.00
28 days interest at $4\frac{1}{2}$ per cent.....	8.75
1 days interest at 4 per cent.....	.28
Total.....	<u>\$2,509.03</u>

Yours very respectfully,

J. G. GUTTING, *Cashier*.

Ex. #16.

Form 56.

295

Ex. #17.

C. H. Davis, President; Wm. Albert, Vice-President; E. E. Galbreath, Vice-Pres.; G. W. Williams, Cashier; J. G. Gutting, Ass't Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$500,000.00.

\$500,000.00 Surplus.

CINCINNATI, O., 3/13, 1911.

First Nat. Bank, Okeana, O.:

We credit your account with principal and interest on call loan as listed below.

Maker, Geo. Eustis & Co., principal.....	\$2,000
7 days interest at 4 per cent.....	\$3.77
— days interest at — per cent.....	\$. . . .
Total.....	<u>\$2,003.77</u>

Yours very respectfully,

G. W. WILLIAMS, *V. P.*

Ex. #17.

Form 56.

296

Ex. #18.

C. H. Davis, President; Wm. Albert, Vice-President; E. E. Galbreath
Vice-Pres.; G. W. Williams, Cashier; J. G. Gutting, Assistant
Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$500,000.00.

\$500,000.00 Surplus.

CINCINNATI, O., Mar. 7, 1911.

First Nat'l Bank, Okeana, O.:

We credit your account with principal and interest on call loan
as listed below.

Maker, F. D. Jamison, principal.....	\$2,500
9 days interest at $4\frac{1}{2}$ per cent.....	\$2.8
25 days interest at 4 per cent.....	\$6.9
Total.....	\$2,509.70

Yours very respectfully,

G. W. WILLIAMS, V. P.

Ex. #18.

Form 56.

297

Ex. #19.

C. H. Davis, President; Wm. Albert, Vice-President; E. E. Galbreath
Vice-Pres.; G. W. Williams, Cashier; J. G. Gutting, Assistant
Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$500,000.00.

\$500,000.00 Surplus.

CINCINNATI, O., Feb. 1, 1911.

First Nat. Bank, Okeana, O.:

We credit your account with Interest only on call loan as listed
below.

Maker, F. D. Jamison, principal.....	\$2,500.0
20 days interest at 5 per cent.....	\$...
— days interest at — per cent.....	\$...
Total.....	\$6.9

Yours very respectfully,

J. G. GUTTING, Cashier.

Ex. #19.

Form 56.

298

Ex. #20.

C. H. Davis, President; Wm. Albert, Vice-President; E. E. Galbreath, Vice-Pres.; G. W. Williams, Cashier; J. G. Gutting, Ass't Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$500,000.00.

\$500,000.00 Surplus.

CINCINNATI, O., Feb. 1, 1911.

First Nat'l Bank, Okeana, O.:

We credit your account with principal and interest on call loan as listed below.

Maker, R. Telker, principal.....	\$2,300
19 days interest at 5 per cent.....	\$....
— days interest at — per cent.....	\$....
Total.....	\$6.07

Yours very respectfully,

J. G. GUTTING, *Cashier*.

Ex. #20.

Form 56.

299

Ex. #21.

C. H. Davis, President; Wm. Albert, Vice-President; E. E. Galbreath, Vice-Pres.; G. W. Williams, Cashier; J. G. Gutting, Ass't Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$500,000.00.

\$500,000.00 Surplus.

CINCINNATI, O., Feb. 1, 1911.

First Nat. Bank, Okeana, O.:

We credit your account with Interest Only on call loan as listed below.

Maker, M. R. Bacheln, principal.....	\$2,500
20 days interest at 5 per cent.....	\$....
— days interest at — per cent.....	\$....
Total.....	\$6.94

Yours very respectfully,

J. G. GUTTING, *Cashier*.

Ex. #21.

Form 56.

300

Ex. #22.

C. H. Davis, President; Wm. Albert, Vice-President; E. E. Galbreath, Vice-Pres.; G. W. Williams, Cashier; J. G. Gutting, Ass't Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$500,000.00.

\$500,000.00 Surplus.

CINCINNATI, O., Feb. 1, 1911.

First Nat. Bank, Okeana, O.:

We credit your account with Interest Only on call loan as listed below.

Maker, F. Day, principal.....	\$2,500
20 days interest at 5 per cent.....	\$.....
— days interest at — per cent.....	\$.....
Total.....	\$6.94

Yours very respectfully,

J. G. GUTTING, *Cashier.*

Ex. #22.

Form 56.

301

Ex. #23.

C. H. Davis, President; Wm. Albert, Vice-President; E. E. Galbreath, Vice-Pres.; G. W. Williams, Cashier; J. G. Gutting, Ass't Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$500,000.00.

\$500,000.00 Surplus.

CINCINNATI, O., 3/3, 1911.

First Nat. Bank, Okeana, O.:

We credit your account with principal and interest on call loan as listed below.

Maker, F. Day, principal.....	\$2,500
9 days interest at 4½ per cent.....	\$2.82
21 days interest at 4 per cent.....	\$5.83
Total.....	\$2,508.65

Yours very respectfully,

G. W. WILLIAMS, *Cashier.*

Ex. #23.

Form 56.

302

Ex. #24.

C. H. Davis, President; Wm. Albert, Vice-President; E. E. Galbreath, Vice-Pres.; G. W. Williams, Cashier; J. G. Gutting, Cashier; J. G. Gutting, Ass't Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$500,000.00.

\$500,000.00 Surplus.

CINCINNATI, O., 2/11, 1911.

First Nat. Bank, Okeana, O.:

We credit your account with principal and interest on call loan as listed below.

Maker, A. Hackman, principal.....	\$2,000
9 days interest at 4½ per cent.....	\$2.25
1 days interest at 4 per cent.....	\$.22
Total.....	\$2,002.47

Yours very respectfully,

G. W. WILLIAMS, *Cashier*.

Ex. #24.

Form 56.

303

Ex. #25.

C. H. Davis, President; Wm. Albert, Vice-President; E. E. Galbreath, Vice-Pres.; G. W. Williams, Cashier; J. G. Gutting, Ass't Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$500,000.00.

\$500,000.00 Surplus.

CINCINNATI, O., Feb. 1, 1911.

First Nat. Bank, Okeana, O.:

We credit your account with Interest Only on call loan as listed below.

Maker, A. Hackman, principal.....	\$2,000
0 days interest at 5 per cent.....	\$.....
— days interest at — per cent.....	\$.....
Total.....	\$5.55

Yours very respectfully,

J. G. GUTTING, *Cashier*.

Ex. #25.

Form 56.

304

Ex. #26.

E. H. Davis, President; Wm. Albert, Vice-President; E. E. Galbreath, Vice-Pres.; G. W. Williams, Cashier; J. G. Gutting, Ass't Cashier; R. V. Johns, Ass't Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$1,000,000.00.

\$1,000,000.00 Surplus.

CINCINNATI, O., July 14, 1911.

1st Nat'l Bank, Okeana, Ohio:

We charge your account with \$2,500.00 in payment of demand loan taken as directed in your favor of the 8 inst. and file note and collateral listed below, subject to your future orders.

Maker, Floyd Day. Rate, 4 per cent from this date.

Collateral, 3,000 Central Mississippi Co. 1st Mtge. 5% Bonds.

Yours very respectfully,

J. G. GUTTING, *Cashier*.

#525.

Ex. #26.

[Stamped across face:] Paid Feb. 29, 1912. First National Bank, Okeana, Ohio.

305

Ex. #27.

C. H. Davis, President; Wm. Albert, Vice-President; E. E. Galbreath, Vice-Pres.; G. W. Williams, Cashier; J. G. Gutting, Ass't Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$500,000.00.

\$500,000.00 Surplus.

CINCINNATI, O., 12/7, 1911.

First National Bank, Okeana, Ohio:

We credit your account with principal and interest on call loan as listed below.

Maker, W. D. Henderson, principal.....	\$2,500.00
36 days interest at 5 per cent.....	\$12.50
— days interest at — per cent.....	\$....

Total.....	\$2,512.50
------------	------------

Will replace if you desire.

Yours very respectfully,

J. G. GUTTING, *Cashier*.

Ex. #27.

Form 56.

306

Ex. #28.

C. H. Davis, President; Wm. Albert, Vice-President; E. E. Galbreath, Vice-President; G. W. Williams, Cashier; J. G. Gutting, Assistant Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$500,000.00.

\$500,000.00 Surplus.

CINCINNATI, O., Feb. 8, 1912.

First National Bank, Okeana, Ohio:

We credit your account with principal and interest on call loan as listed below.

Maker, Howard L. Sullivan, principal.....	\$2,000.00
7 days interest at 5 per cent.....	1.94
Total.....	<u>\$2,001.94</u>

Yours very respectfully,

J. G. GUTTING, *Cashier*.

Ex. #28.

307

Ex. #29.

E. H. Davis, President; Wm. Albert, Vice-President; C. E. Galbreath, Vice-Pres.; J. G. Gutting, Ass't Cashier; R. V. Johns, Ass't Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$1,000,000.00.

\$1,000,000 Surplus.

CINCINNATI, O., Jan. 12, 1912.

First Nat. Bank, Okeana, O.:

We charge your account with \$2,000.00 in payment of demand loan taken as directed in your favor of the 11 inst. and file note and collateral listed below, subject to your future orders.

Maker, A. J. Hassman. Rate, 5 per cent from this date.

Collateral, 12 sh. 5th, 3rd Nat. Bank.

Yours very respectfully,

J. G. GUTTING, *Cashier*.

#690.

Ex. #29.

308

Ex. #30.

E. H. Davis, President; Wm. Albert, Vice-President; C. E. Galbreath, Vice-Pres.; G. W. Williams, Cashier; J. G. Gutting, Ass't Cashier; R. V. Johns, Ass't Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$1,000,000.00.

\$1,000,000 Surplus.

CINCINNATI, O., June 24, 1911.

First Nat'l Bank, Okeana, Ohio:

We charge your account with \$2,500.00 in payment of demand loan taken as directed in your favor of the 23 inst. and file note and collateral listed below, subject to your future orders.

Maker, W. D. Henderson. Rate, 4 per cent from this date.

Collateral, 21 sh. Norwood Nat'l Bank; 10 sh. Henderson Litho. Co.

Yours very respectfully,

J. G. GUTTING, *Cashier*.

#502.

Ex. #30.

309

Ex. #31.

E. H. Davis, President; Wm. Albert, Vice-President; C. E. Galbreath, Vice-President; G. W. Williams, Cashier; J. G. Gutting, Ass't Cashier; R. V. Johns, Ass't Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$1,000,000.00.

\$1,000,000.00 Surplus.

CINCINNATI, O., Jan. 6, 1912.

First National Bank, Okeana, Ohio:

We charge your account with \$2,000.00 in payment of demand loan taken as directed in your favor of the 4 inst. and file note and collateral listed below, subject to your future orders.

Maker, Howard L. Sullivan. Rate, 5 per cent from this date.

Collateral, 150 shares Provident Savgs. Bk. & Trust Co. stock.

Yours very respectfully,

J. G. GUTTING, *Cashier*.

#683.

Ex. #31.

310

Ex. #32.

C. H. Davis, President; Wm. Albert, Vice-President; E. E. Galbreath, Vice-President; G. W. Williams, Cashier; J. G. Gutting, Assistant Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$500,000.00.

\$500,000.00 Surplus.

CINCINNATI, O., Mar. 21, 1912.

First National Bank, Okeana, Ohio:

We credit your account with principal and interest on call loan as listed below.

Maker, A. J. Hassmer, principal.....	\$2,000.00
28 days interest at 4½ per cent.....	7.00
21 days interest at 4 per cent.....	4.67
Total.....	\$2,011.67

Yours very respectfully, J. G. GUTTING, *Cashier*.

Ex. #32.

311

Ex. #33.

Wm. Albert, Vice-President; E. E. Galbreath, President; R. V. Johns, Assistant Cashier; E. R. Solar, Auditor; R. Telker, Assistant Cashier; J. G. Gutting, Cashier.

SECOND NATIONAL BANK.

Original Charter No. 32.

Capital, \$1,000,000.00.

Surplus, \$1,000,000.00.

CINCINNATI, OHIO, Feb. 1, 1912.

1st Nat'l Bank, Okeana, Ohio:

We credit your account with interest to date on call loans as follows, viz:

Name.	Amount.	Time.	Rate.	Amount int.
A. J. Hassman.....	2,000	20 da.	5	5.56
M. R. Bacheln.....	2,500	92 da.	..	31.94
Floyd Day	2,500	.....	..	31.94
F. D. Jamison.....	2,500	.....	..	31.94
W. M. Perin.....	1,000	.....	..	12.78
H. L. Sullivan.....	2,000	26 da.	..	7.22
T. Clauss	2,500	34 "	..	11.81
J. Gutting	2,500	44 "	..	15.28
E. E. Galbreath.....	2,500	54 "	..	18.75
I. G. Doyle.....	2,500	27 "	..	9.38
Geo. Black	2,500	44 "	..	15.28
				<hr/> 191.88

Ex. #33.

312

Ex. #34.

\$2,500.00.

CINCINNATI, O., Jan'y 31st, 1908.

On Demand after date, I promise to pay myself or order, Twelve thousand & five hundred 00/100 Dollars, for value received: payable at Second National Bank, with interest at 5 per cent. per annum, and I hereby pledge as collateral security for the payment of this note and all other obligations now owing, or which I may hereafter owe to said bank 12 Shares of 2nd Nat. (Cin.) Bank Stock.

In case of the market quotations of said collaterals declining, I hereby agree, upon request of the holder hereof, to either pledge additional collaterals or reduce the principal of this obligation by payment, so that the quoted market value of said collaterals shall at all times exceed the sum loaned thereon at least — per cent., and in default of which agreement, or of payment at maturity of this obligation, I hereby authorize and empower the holder hereof, at any time thereafter to sell at my expense, all or any portion of said collaterals at any place in Cincinnati or elsewhere, at public or private sale, at holder's option, and with or without notice. In case of public sale, the holder hereof may purchase said collaterals or any part thereof, without liability beyond the net proceeds of such sale.

(Signed)

I. DOYLE.

Ex. #34.

313

Ex. #35.

Id. #35.

Copy.

T.

S—2664.

Office of Comptroller of the Currency.

Address reply to "Comptroller of the Currency."

TREASURY DEPARTMENT.

WASHINGTON, March 4, 1911.

The Board of Directors the Second National Bank, Cincinnati, Ohio.

GENTLEMEN: The report of the examination of your bank made on January 31 to February 7 has had careful consideration. This report shows the following extension of credit to the Ford & Johnson Company and its subsidiary concerns, the Central Storage Warehouse Company, the Western Furniture Exposition Company and the Helena Manufacturing Company:

Direct loans to Ford & Johnson Company.....	\$171,500.00
Bills of sale of furniture, amounting to about \$85,000 held as collateral.	
Paper of Helena Manfg. Co., and the U. S. Rattan Co., End. by Ford & Johnson Co. and renewed for its benefit	36,066.05
N. S. Keith accommodation notes (interest paid by F. & J.)	50,000.00
C. H. Davis and Geo. B. Cox (indirect accommodation)	25,000.00
N. S. Keith, G. B. Cox, et al. (indirect accommodation)	7,500.00
Central Storage Warehouse Co., End. Ford & Johnson Co.	100,000.00
G. V. Cutter accommodation note.	95,000.00

This note is secured by \$100,000 Ford & Johnson Co. notes, and has been rediscounted at the Mercantile National Bank of New York, which has authority to charge it back to your bank at maturity.

Loans for the benefit of the company.....	485,066.05
Bonds of Central Storage Warehouse Co., \$12,000.00	
Bonds of Western Furniture Exposition Co. 85,000.00	
	97,000.00
	<hr/> 582,066.05

In addition, there are other loans in the bank secured by notes and stock of the Ford & Johnson Company, amounting to \$51,055, making a total of \$633,121.05 depending upon this concern for payment.

The loan to this Company is not only in excess of the legal limit, but in the opinion of the examiner it is hazardous. It is reported that the company has been under poor management, that it is not in good financial condition, and that its stock has no value. It seems that several of the active officers of the bank are interested in the company, that they have felt obligated to take up the loans of the concern which other banks have refused to carry any longer, and that as a result, the indebtedness has very materially increased since the last examination.

The \$95,000 Cutter accommodation note did not appear on the books as a liability of the bank nor as a part of the Ford & Johnson Company loan. There is said to be no resolution of the board, of record, authorizing its rediscount or the New York bank to charge it back at maturity, and during the examination the examiner was informed by the officers that no such liability existed and that the list he then had (not including the Cutter note) comprised all of the loan to this company. It seems that the officers endeavored to conceal the full extent of the Ford & Johnson Company indebtedness.

You state in your letter of February 10, that the bank is taking

\$200,000 first mortgage bonds of Ford & Johnson Company, in lieu of an equal amount of the company's indebtedness in its present form. This arrangement will hardly improve the bank's position in the matter, as it will serve to make the indebtedness more permanent. The bank already owns \$97,000 bonds of the two subsidiary concerns and must not acquire any more of the securities of these allied interests. Your efforts should be exerted to obtain a real reduction of the indebtedness of this company, and it is expected that the next examination will show a great improvement in that respect.

The past due paper on the day of the examination amounted to \$365,511.40, of which \$70,117.36 appears to have been charged off. This is an unwarranted accumulation of past due paper, and every effort should be made to collect or renew it.

The following loans are regarded as extremely doubtful, and must be charged off at the time of the next examination if still in the bank:

The Huntington China Co. (in receiver's hands)	\$9,922.34
The German-Russell Company (receivership)	4,792.19
Andrew T. Herd	759.25
The Roberts Manufacturing Co. (receivership)	600.00
The Defiance City Bank	4,500.00
The Smith-Pattison Co. (receivership)	808.00
Philip Winkler	445.50
C. F. Dolle	4,113.68
A. E. Hutson	4,095.86
W. E. and Ella M. Smith	600.00
The Brighton Laundry Company	292.00
Mary B. Kasselmann	135.00
T. C. Campbell	6,000.00
Frazer D. Acomb	250.00
J. H. Dickey	3,800.00
R. L. Dollings, C. W. Richards and D. A. Trapp	2,075.00
George W. Harding	2,431.84
The Huntington Produce & Feed Co.	2,100.00
C. W. Stewart	6,375.50
Wm. E. Spink	10,000.00
George T. Brannon	14,987.10
	<hr/>
	\$79,083.26

The following loans are very undesirable and should be collected as soon as possible:

E. G. Schulte Company (receivership)	3,642.94
Joseph Cantor and Cantor Cigar Co. (bankruptcy)	351.82
C. F. Dolle	3,275.00
Nick Ruebel	2,000.00
Francis J. and B. P. Critchell	993.46
W. G. Chaney	31,689.74
John G. Webb	5,000.00

J. H. Dickey	6,875.00
W. Douglas Webb and J. H. Dickey	3,600.00
Forwarded	57,427.96
Amount forward	\$57,427.96
Claude Ashbrook	9,550.00
P. H. and Pauline Mahatchie	261.13
O. B. Schramm	1,070.03
J. Fred Weiler	31,555.00
Secured by Ford & Johnson Co. stock of no value.	
Wm. C. Horton	3,500.00
Farmers Bank of Cain Valley, Ky. (receivership)	9,900.25
	<hr/>
	\$113,264.37

The following loans are slow, and should have the closest attention with a view to their early elimination:

The Wiborg & Hanna Co. (receivership)	38,198.13
The Enterprise Lumber Co. (receivership)	13,687.96
H. C. Yergason	3,400.00
The American Publishing Co.	20,540.00
F. H. Talbott	2,000.00
Wimmers Bros. Cigar Box Co. (Receivership)	300.00
C. L. Hils (receivership)	10,450.00
Five notes discounted for C. L. Hils	600.46
The Debold Loan & Building Co. (receivership)	2,500.00
J. D. Campbell	3,125.89
The Ohio River & Columbus Railway Co.	110,000.00
Do. (accommodation notes of C. H. Huttig and G. W. Galbreath)	50,000.00
	<hr/>
	254,802.44

Special attention is called to the following lines of credit:

Guaranty Bank & Trust Company of Birmingham, Ala.	\$15,405.52
City Bank & Trust Company of Birmingham	31,756.50
Alabama Trust & Savings Bank of Birmingham	51,490.47
Paper taken from Alabama Trust & Savings Bank	92,330.44
	<hr/>
	190,982.93

This is regarded as a particularly hazardous indebtedness, and it remains practically unchanged since the last examination. In the opinion of the examiner a heavy loss will be sustained on it. These different names are really one concern. The original institution was the Citizens Savings Bank, which was absorbed by the Alabama Bank & Trust Company, which was in turn absorbed by the City Bank & Trust Company, which was then taken over by the Guaranty Bank & Trust Company, now in the hands of a receiver.

Other extended lines:

W. E. Hutton & Company..... 195,297.19

Over \$100,000 of this loan is unsecured, and should — adequately secured without delay.

Metropolitan Bank & Trust Company of Cincinnati... 128,351.63

Ohio River & Columbus Railway Co..... 160,000.00

This item is included in the list of slow loans mentioned above.

There is an estimated loss of \$38,000 on items in the schedule of bonds, securities, etc.

In view of the foregoing the condition of your bank must be regarded as very unsatisfactory. The estimated losses, the questionable assets, and other assets which for one reason or another are subject to criticism aggregate nearly \$2,000,000. Many of the objectionable loans are of long standing and appear to be in worse condition than ever before, and on the whole very little progress has been made in remedying conditions repeatedly criticised by the examiners and this office.

Immediate and effective measures must be taken to restore the bank to a safe and satisfactory basis. The Ford & Johnson Company indebtedness, which is a serious menace to the bank, must be very materially reduced, and the balance adequately protected, and the long lists of other slow, extended and questionable loans, hereinbefore set forth, must be given immediate attention, with a view to carrying out the requirements of this letter.

The directors should realize the seriousness of the situation, and give their best efforts to the work of correcting existing conditions. Marked improvements must be shown at an early date, and this can be brought about only by the united efforts of the directors and officers.

A prompt reply to this letter is requested, signed by all of the directors, stating that the requirements of this letter will be complied with, and what they propose to do to effect the necessary improvement in the bank's condition.

Respectfully,

(Signed)

T. P. KANE,
Deputy and Acting Comptroller.

Ex. #35.

314

Ex. #36.

No. 7.

Pay to the order First Nat'l Bank, Okeana, Ohio..... \$4,500.00
Forty-five Hundred & no/100..... Dollars

FIRST NATIONAL BANK,
OKEANA, OHIO,

April 12, 1912.

F. W. EARNSHAW, *Cashier.*

Cincinnati, Ohio,
Second National Bank.

Ex. #36.

315

CINCINNATI, OHIO, October 18th, 1911.

At the special meeting of the Board of Directors called by the President to meet and confer with the National Bank Examiner, at 11 A. M. on above date, the following members were present: Messrs. C. H. Davis, John F. Robinson, Wm. Albert, John Omwake and E. E. Galbreath. The exceptions to the paper held by the bank were gone over and on recommendation by Mr. De Camp, the following resolution was offered by Mr. E. E. Galbreath, seconded by Mr. Robinson and on motion unanimously adopted.

Resolved: That the officers of the Second National Bank are herewith authorized and instructed to charge to profit and loss, the following:

The German-Russell Co.:

Note dated 1-28-09, due 5-28-09.....	1,500.00	
" " 1-28-09, " 4-28-09.....	1,500.00	
		<hr/> \$3,000.00

(Endorsed by Chas. M. Leslie.)

Frazer D. Acomb:

Note dated 6-17-07, due 9-16-07.....	250.00
--------------------------------------	--------

T. C. Campbell:

Note dated 10-2-03, due 2-2-04.....	6,000.00
-------------------------------------	----------

Andrew T. Herd:

Note dated 4-7-11, due 7-16-11.....	759.25
-------------------------------------	--------

The Smith-Pattison Co.:

Note dated 1-3-08, due 3-3-08, H. A. Schroeter.....	808.00
---	--------

The Huntington China Co.:

Note due on demand.....	9,922.34
-------------------------	----------

C. W. & J. I. Stewart:

Note dated 1-26-10, due on demand.....	286.50
--	--------

C. W. Stewart:

Note dated 11-22-09, due on demand.....	1,330.00
---	----------

A. H. Id. 37, P. 1.

316 The Bank of Kentucky:	
Note dated 11-26-10, due on demand.....	\$421.81

A. E. Hutson:

Note dated 7-14-11, due 11-14-11.....	1,800.54
" " 3-14-11, due on demand.....	2,145.32

W. E. & Ella Smith:	
Note dated 4-25-11, due on demand.....	319.10
Cripple Creek Central Ry. Co.:	
Depreciation in stock.....	10,000.00
E. H. Smith:	
Taken from Alabama Trust & Savings Bank Co.....	14,987.10
	<hr/> \$52,029.96

Mr. De Camp further recommended that a more recent resolution be passed by the Board of Directors authorizing the officers of the bank to borrow from time to time from their correspondents. He also submitted a list of paper to be collected at once by the bank.

After a discussion of matters of minor details, on motion the meeting adjourned.

(Signed)

C. H. DAVIS, *Chairman.*

(Signed)

J. G. GUTTING, *Secretary.*

A. H. Id. 37, P. 2.

317

CINCINNATI, OHIO, May 29th, 1911.

The Board of Directors met in regular session at 11 A. M. Members present: Messrs. C. H. Davis, Lee H. Brooks, E. E. Galbreath, John F. Robinson and Wm. Albert. The minutes of the previous meeting were read and approved. All loans made during the week were read to and approved by the members of the board present. The Secretary reported that there had been nine (9) Commercial and sixteen (16) Savings accounts opened and four (4) Safe Deposit boxes rented during the week.

On recommendation by the officers of the Bank, the following resolution was offered by Mr. Brooks, seconded by Mr. Robinson and on motion unanimously adopted:

Resolved, That the officers be instructed to charge the following notes to Profit and Loss.

Call loans:

Philip Winkler	445.50
Charles F. Dolle.....	4,113.68
J. H. Dickey	3,800.00
Huntington Produce Co.	2,100.00
C. W. Stewart.....	4,600.00

Time loans:

Brighton Laundry Co.....	292.80
Mary B. Kasselman.....	135.00
German-Russell Co.	912.00

Bills of Ex.:

De Loach Mill Mfg. Co. Endorsed by German-Russell..	192.19
---	--------

Total.....	\$16,591.17
-------------------	--------------------

After a discussion of matters of general interest to the Bank, on motion the meeting adjourned.

(Signed)

C. H. DAVIS, *Chairman.*

(Signed)

J. G. GUTTING, *Secretary.*

Id. 38.

318

CINCINNATI, OHIO, April 6th, 1912.

The Board of Directors met in special session at 4.30 P. M. Members present: Messrs. C. H. Davis, John G. Robinson, E. E. Galbreath, Sam'l J. Murray, Wm. Albert, Lee H. Brooks and J. G. Gutting.

Having agreed with Mr. McCune on a Further charge off, the following resolution was offered by Mr. J. G. Robinson, seconded by Mr. Brooks and on motion unanimously adopted:

"Resolved, that the Officers be, and they are hereby authorized and instructed to charge to Surplus account and credit to Profit & Loss account \$250,000.00."

The following resolution was offered by Mr. Robinson, seconded by Mr. Murray and on motion unanimously adopted, each member present voting aye as his name was called:

"Resolved, that the officers be, and they are hereby authorized and instructed to charge to Profit & Loss account \$242,617.05 covering paper as listed."

Wimmers Bros	300.00
Asher, I. M.	150.00
Allen & Roberts (bal.)	864.69
Cin. Equipment Co. (bal.)	1,750.00
Cin. Equipment Co. (bal.)	5,000.00
Adams Wall Paper (bal.)	463.81
Hengst, G. W.	300.00
"	175.00
"	1,000.00
"	410.00
"	275.00
Jones Davis Co.	2,000.00
Adams Wall Paper Co.	1,000.00
Cincinnati Equip. Co.	1,000.00
Total	\$14,688.50

Id. 39, p. 1.

319

Call Loans.

McClure, T. F., Trustee	\$20,000.00
McCarthy, C. E.	11,000.00
Ireton, L. A. (Bal.)	5,000.00
Hermes, C. F.	5,810.00
Williams, R. P.	5,000.00

Schmidt, Jr., Wm.	12,560.00
Haley, J. W.	532.00
Fordyce, T. N.	1,000.00
"	1,000.00
"	1,000.00
"	1,000.00
"	600.00
"	400.00
Dowling, H. P. (Bal.)	784.23
Bates, C.	19,000.00
Alabama Bank & Trust Co.	10,000.00
Albert, Wm.	16,000.00
Hutcheson, J. W. (Bal.)	2,200.00
" H. H.	3,000.00
Ford, C. A.	1,500.00
Strafer, A. F.	1,050.00
Albert, Wm. (Bal.)	17,670.13
Adkins, J. S. (Part)	2,500.00
Chaney, W. G. "	5,000.00
Dickey, J. H. "	1,875.00
Forman, W. A. (Bal.)	3,042.19
Ireton, L. A. (Part)	5,000.00
Jones, S. P. "	10,000.00
Landis, J. H. "	12,550.00
Keith, N. S. "	4,100.00
McClure, T. F. "	2,750.00
Weiler, J. F.	31,555.00
Hutton, W. E.	13,500.00
C/L Total	\$227,928.55
T/L "	14,688.50
"	\$242,617.05

It was moved and seconded that all notes charged to Profit & Loss, remain in the Bank and be accounted for until paid.

The motion was carried.

There being no further business, on motion the meeting adjourned.

(Signed)

C. H. DAVIS, *Chairman.*

(Signed)

J. G. GUTTING, *Secretary.*

Id. 39, P. 2.

320

CINCINNATI, OHIO, February 23rd, 1912.

At the regular meeting of the Board of Directors held on above date at 11 A. M., the following members were present: Messrs. C. H. Davis, John Omwake, E. E. Galbreath, John G. Robinson, Wm. Albert, Sam'l J. Murray, Lee H. Brooks and J. G. Gutting.

On motion, the reading of the minutes and regular order of business was dispensed with.

Mr. McCune was then requested to again go into detail regarding his recent examination of the Bank which was done and after considerable discussion, it was unanimously agreed, that there was about \$600,000.00 in slow, doubtful and bad assets which should be charged from the books of the bank, whereupon, the following resolution was offered by Mr. Omwake, seconded by Mr. Robinson and on roll call, unanimously adopted, each member present voting aye as his name was called.

"Resolved," That the Officers be, and they are hereby authorized and instructed, to charge to Surplus account and Credit to Profit and Loss account, \$500,000.00 on or before March 15th, 1912.

The following resolution was offered by Mr. Omwake seconded by Mr. Brooks and on roll call unanimously adopted each member present voting aye as his name was called.

"Resolved," That the Officers be, and they are hereby authorized and instructed to charge to Profit and Loss account on or before March 15th, 1912, the following:

Id. 40, p. 1.

321

Call Loans.		Time Loans.	
Alabama Trust & Sav. Bank, Birmingham, Ala.	\$14,987.10	Adams Wall Paper Co....	3,000.00
Alabama Trust & Sav. Bank, Birmingham, Ala.	14,985.00	" " " "	2,000.00
T. H. Brown.....	5,000.00	B. F. Barber.....	5,076.67
W. A. Chenoweth.....	1,000.00	"	5,076.67
W. H. Davis.....	20,000.00	Allen & Roberts Co.....	1,650.00
J. H. Diekey.....	2,500.00	"	350.00
Douglass, Webb & Co.....	1,000.00	Cincinnati Eq. Co.....	1,250.00
Guarantee Bank & Trust Co., Birmingham, Ala..	2,655.52	"	1,600.00
W. A. Forman.....	10,000.00	"	1,900.00
Huntington China Co.....	9,922.34	"	3,000.00
L. A. Ireton.....	10,000.00	"	2,250.00
Sam P. Jones.....	10,000.00	Jones, Davis Co.....	8,000.00
T. F. McClure.....	6,000.00	A. E. Hutson.....	2,145.32
J. J. McHenry & G. S. Bridges	2,000.00	L. P. Beech.....	450.00
J. J. McHenry & G. S. Bridges	1,600.00	G. & F. Detzel.....	807.50
Clark B. Montgomery....	2,500.00	German, Russell Co.....	1,500.00
Geo. M. Webb.....	50,000.00	"	1,500.00
J. C. Willis.....	6,000.00	R. J. H. Smith & Co.....	775.00
J. S. Woods.....	11,775.00	Bessie M. Cooper.....	679.25
E. I. Winfrey.....	802.00	Frazer D. Acomb.....	250.00
Frances J. Critchell.....	993.46	Ford & Johnson Co., 34 Notes at \$1,000.....	34,000.00
P. M. Crowe.....	1,800.00	Ford-Helena Mfg. Co.....	2,614.95
"	54.30	"	5,000.00
Debolt Loan & Building Ass'n	2,500.00	"	5,000.00
Defiance City Bank.....	3,506.98	"	3,711.87
V. S. Hollander.....	483.00	"	3,500.00
A. E. Hutson.....	1,800.54	"	2,475.31
B. McAfee et al.....	850.00	Total	\$99,562.54

Ford & Johnson Co.—

\$25,000.
 25,000.
 25,000.
 2,500.
 10,000.
 5,000.
 5,000.
 18,500.
7,514.04

123,514.04

Total \$318,229.28

Id. 40, p. 2.

322

Bonds & Stocks.

Interurban Railway & Terminal Co.....	\$65,700.00	Charge of	\$5,950.00
Columbus Street Ry. 4% Bonds.....	135,240.00	" "	15,640.00
Cincinnati, Dayton & Toledo.....	49,391.40	" "	3,491.40
Knoxville Ry., Lt. & Power Co.....	5,000.00	" "	200.00
New Orleans Gt. Northern.....	55,600.00	" "	10,000.00
Northern Ohio Traction Co.....	1,000.00	" "	120.00
Central Storage Warehouse Co.....	12,000.00	" "	4,800.00
Western Furniture Exposition Co.....	85,000.00	" "	34,000.00
Ford & Johnson Co.....	177,500.00	" "	71,000.00
American Publishers' Co.....	10,000.00	" "	2,000.00
Cripple Creek Central Ry. Co.....	25,200.00	" "	12,800.00
Cincinnati & Other Bonds.....		" "	3,122.00
Hamilton Iron & Steel Co.....	2,125.00	" "	1,240.00
American Publishers' Co.....	8,500.00	" "	7,500.00
Co-Operative Agencies Co.....	10,000.00	" "	6,000.00
Western & Atlantic Fire Ins. Co.....	5,000.00	" "	3,750.00

Total \$181,613.40

Out of Cash.

Ford & Johnson Expense Item..... 2,000.00

Total of Charges to Profit & Loss.

Call Loans	\$318,229.28
Time Loans	99,562.54
Bonds & Stocks.....	181,613.40
Cash Item	2,000.00

Total \$601,405.22

The following resolution was offered by Mr. Omwage, seconded by Mr. Robinson and on roll call, unanimously adopted:

"Resolved," That the action of the Officers in borrowing \$200,700.00 from the First National Bank, Chicago, Ill., \$218,000.00 from the Fort Dearborn National Bank, Chicago, Ill., & \$200,000.00 from the Mechanics & Metals Nat. Bank, New York under the old resolution adopted August 5th, 1910, be and the same is hereby approved and the General Resolution adopted on August 5th, 1910, is hereby repealed.

The following resolution was offered by Mr. Galbreath, seconded by Mr. Murray and on motion unanimously adopted:

"Resolved," That hereafter all obligations of this bank be shown on the General Statement Book.

There being no further business, on motion the meeting adjourned.

Attest:

(Signed)

(Signed)

J. G. GUTTING, *Secretary.*

C. H. DAVIS, *Chairman.*

Id. 40, P. 3.

Ex. 246.

323

Direct Loans to Ford & Johnson Co.....	\$171,500.00	\$50,000 chgd. to Profit & Loss, 2-24-1912; \$7,891.74 Pd. 2-27-12 to 4-30-12.
		34,000 chgd. to P. & L. on 4-30-12.
		37,500 Paid 2-21-11.
		25,000 Paid 2-21-11.
		25,000 Renew 2-28-11 chgd. to P. & L. 2-24-1912.
Helena Mfg. & U. S. Rattan Cos.....	\$36,066.05	\$2,614.95 Renew 2-24-11.
		3,500.00 " May 27, 1911.
		3,711.87 " May 15, 1911.
		10,000.00 " March 2, 1911.
		5,182.37 " Apr. 13, 1911.
		2,355.75 " Apr. 6, 1911.
		4,050.50 " Mar. 9, 1911.
		4,650.61 " Mar. 7, 1911.
		Helena Mfg. Company.
		U. S. Rattan Company.
N. S. Keith, Accommodation Note.....	\$50,000.00	Paid Sept. 19, 1911.
C. H. Davis & Geo. B. Cox, \$25,000.....	15,000.00	Paid May 3rd, 1911, Coll. \$31,500. Central Storage & Whse.
		Bonds, sold Jan. 17, 1913, for \$15,750.00.
N. S. Keith & G. B. Cox.....	\$7,500.00	Paid March 11, 1911.
Central Storage Whse. Co.....	\$100,000	Paid Feb. 21, 1911.
C. V. Cutler, Accommodation note.....	\$95,000	Taken up by Guarantee of directors individually.
Bonds of the Central Storage Whse. Co.....	\$12,000	Sold Jan. 17, 1913, \$6,000.00.
Bonds of Western Furniture Co.....	\$85,000	Sold Feb. 24, 1914, \$9,000.00.
The Huntington China Co.....	\$9,922.34	\$2,500 pd. Feb. 24, 1913.
		7,422.34 chgd. to Profit and Loss the same day.
The German Russell Co.....	4,792.19	100.00 pd. Mar. 7, 1911.
		588.00 pd. Feb. 21, 1911.
		4,104.19 chgs. to Profit and Loss, May 31, 1911.
Andrew T. Herd.....	759.25	Chgd. to Profit & Loss, Feb. 16, 1912.
Roberts Mfg. Co.....	600.00	do.
Defiance City Bank.....	4,500.00	993.02 Paid.
		3,506.98 Chgd. to Profit & Loss, Feb. 24, 1912.
The Smith-Pattison Co.....	808.00	Paid, Nov. 27, 1911.
Phillip Winkler.....	445.50	Chgd. to Profit & Loss, May 31, 1911.

C. F. Delle.....	4,113.08	do.	May 31, 1911.—Suit pending.
A. E. Hutson.....	4,065.86	do.	Feb. 24, 1912.
W. E. and Ella M. Smith.....	600.00	280.90	Paid April 20, 1911.
The Brighton Laundry Co.....	292.00	319.10	" Sept. 19, 1913.
Mary B. Kasselman.....	135.00	Chgd. to Profit & Loss,	May 31, 1911.
T. C. Campbell.....	6,000.00	do.	May 31, 1911.
		2,500.00	Paid Feb. 15, 1912.
		3,500.00	Chgd. to Profit & Loss, Feb. 15, 1912.
		Paid April 2, 1912.	
Ex. # 46.	250.00		
324			
J. H. Dickey.....	3,800.	Chgd. to Profit & Loss,	May 31, 1911.
Dollings, Richards & Trapp.....	2,075.	Paid Oct. 18, 1911, by secured note of Dollings & Trapp, which	has been paid (them?) to \$400 by transferring property to us.
Geo. W. Harding.....	2,431.84	Paid.	
The Huntington Produce Co.....	2,100.00	Chgd. to Profit & Loss,	May 31, 1911.
C. W. Stewart.....	6,375.50	\$1,616.50	Paid Feb. 10, 1912.
Wm. E. Spinick.....	10,000.00	4,600.00	Chgd. to Profit & Loss, May 31, 1911.
Geo. T. Brannon.....	14,987.10	Chgd. to Profit & Loss,	July 25, 1911.
E. G. Schulte Co.....	3,642.94	do.	Feb. 24, 1912.
Jos. Cantor.....	351.82	do.	Apr. 30, 1912.
C. F. Delle.....	3,275.00	do.	Apr. 20, 1912.
		525.00	Paid, June 10, 1911.
		250.00	" Dec. 19, 1911.
		2,500.00	Chgd. to Profit & Loss, Apr. 30, 1912.
Nick Ruebel.....	2,000.00	Paid Oct. 1, 1912.	Suit pending.
F. J. & B. P. Critchell.....	993.46	Chgd. to Profit & Loss,	Apr. 30, 1912.
W. G. Chaney.....	31,689.74	do.	Apr. 30, 1912.
			\$9,504.46 since paid, & hold Poles, &c.
John C. Webb.....	5,000.00	Paid Oct. 28, 1911.	
J. H. Dickey.....	6,875.00	Chgd. to Profit & Loss,	Apr. 30, 1912.
W. D. Webb & J. H. Dickey.....	3,600.00	2,600.00	Chgd. to Profit & Loss, July 11, 1911.
		1,000.00	do.
Claud Ashbrook.....	9,550.00	Paid Nov. 1, 1911.	
P. H. and Pauline Mahatchie.....	261.13	Paid March 30, 1911.	
O. B. Schramm.....	1,070.03	40.00	Paid May 21, 1912.

1481

J. Fred Weiler.....	31,555.00	744.20	"	June 3, 1912.
Wm. C. Horton.....	3,500.00	285.83	"	Chgd. to Profit & Loss, Nov. 2, 1912.
Farmers' Bk. of Cane Valley.....	9,900.25			Chgd. to Profit & Loss, Apr. 30, 1912.
The Wiborg-Hanna Co.....	38,198.13			Paid Apr. 1, 1913.
Enterprise Lbr. Co.....	13,687.96			Various notes discounted for them; all paid.
				\$23,414.08 paid to date.
				2,742.00 paid June 1, 1913.
				10,968.00 1st mortgage bonds on hand.
H. C. Yerguson.....	3,400.00			Nothing paid, collateral held 10 shs. Walnut Hills Dis. Tel. 30.
				20 " Clin. Ry. Omnibus Co.
				60 " United Box Board & Paper Co.
American Publishing Co.....	20,540.00			Our books show only \$2,040.00, which was paid out in \$100 pay'ls.
F. H. Talbott.....	2,000.00			Nothing Paid. Coll. held \$1,000 bonds of Guanaquato Reduction Co.
Wimmers Bros.	300.00			Chgd. to Profit & Loss, 4-30-12.
C. L. Hills.....	10,450.00			\$4,000 pd. July 2nd, 1912.
				6,450 chgd. to Profit & Loss, July 2nd, 1912.
C. L. Hills, 5 notes discounted.....	600.46			All paid.
Diebolt Loan & Bldg. Co.....	2,500.00			Chgd. to Profit & Loss, Apr. 30, 1912.
J. D. Campbell.....	3,125.89			do. Apr. 30, 1912.
Ohio River & Columbus Ry. Co.....	110,000.00			Paid April 11, 1912.

Ex. #47.

325

Ex. # 48.

Accommodation notes of C. H. Huttig & G. W. Galbreath
 Guaranty Bk. & Tr. Co. of Birmingham
 City Bk. & Tr. Co.
 Alabama Tr. & Sav. Bk.
 Paper taken from Alabama Tr. & Sav.
 W. E. Hutton & Co.

..... \$15,405.52
 \$1,756.50
 51,490.47
 92,330.44
 105,297.19

\$50,000. Paid April 11, 1912.

In Litigation.

\$14,350.00	Paid May	27, 1911.
22,000.00	Paid May	3, 1911.
3,587.50	" May	20, 1911.
4,000.00	" Apr.	6, 1911.
20,000.00	" June	29, 1911.
10,000.00	" June	27, 1911.
15,800.00	" Aug.	30, 1911.
10,000.00	" Oct.	13, 1911.
6,500.00	" Sep.	14, 1911.
5,000.00	" Sep.	13, 1911.
6,000.00	" Sep.	13, 1911.
4,000.00	" Oct.	13, 1911.
3,200.00	" Jan.	3, 1912.
19,000.00	" Jan.	12, 1912.
20,000.00	" Jan.	3, 1912.
15,000.00	" March	26, 1912.
16,000.00	" March	26, 1912.
12,500.00	Paid Sept.	23, 1911.
3,000.00	" Mar.	3, 1911.
10,000.00	" Apr.	17, 1911.
10,000.00	" June	5, 1911.
5,000.00	" Aug.	29, 1911.
3,000.00	" Sep.	8, 1911.
8,500.00	" Sep.	21, 1911.
57,351.03	" Sep.	20, 1911.
20,000.00	\$13,000 Paid Oct. 9, 1914.	Balance in suit.

Metropolitan Bk. & Tr. Co. 128,351.03

T. F. McClure, Trustee.

Ex. # 48.

326

Ex. #49.

37 500 00
25 000 00
50 000 00
15 000 00
7 500 00
100 000 00
100 00
588 00
993 02
808 00
280 90
525 00
5 000 00
9 550 00
261 13
9 900 25
600 46
14 350 00
22 000 00
3 587 50
4 000 00
20 000 00
10 000 00
15 800 00
10 000 00
6 500 00
5 000 00
4 000 00
12 900 00
3 000 00
10 000 00
10 000 00
5 000 00
3 600 00
8 500 00
55 351 63

487 195 89

Paid to 12/9/1911.

250 00
20 000 00
3 200 00

510 645 89

Paid to 1/5- 1912.

7 891 74
 2 500 00
 250 00
 1 616 50
 110 000 00
 50 000 00
 19 000 00
 15 000 00
 16 000 00

732 904 13

Paid to Apr. 15, 1912.

6 680 36
 15 750 00
 6 000 00
 9 000 00
 2 500 00
 319 10
 1 675 00
 2 000 00
 9 504 46
 40 00
 744 20
 3 500 00
 23 414 08
 2 742 00
 2 040 00
 4 000 00
 13 000 00

102 909 20

732 904 13

835 813 33

Total paid to date.

Ex. #49.

327

Ex. "A."

Reconcilements should be signed by an officer of the bank.

First Nat'l Bank, Okeana, Ohio.

JAN. 8, 1912.

Second National Bank, Cincinnati, Ohio:

Your account current to Dec. 31, '11, showing a balance of \$1,311.65 due us, agrees with our books, with the exceptions noted below.

Yours respectfully,

F. W. EARNSHAW, *Cashier.*

Ex. A.

Form 21.

328

Ex. "B."

Reconcilements should be signed by an officer of the bank.

First Nat'l Bank, Okeana, Ohio.

FEB. 2, 1912.

Second National Bank, Cincinnati, Ohio:

Your account current to Jan. 31, '12, showing a balance of \$2,619.95 due us, agrees with our books, with the exceptions noted below.

Yours respectfully,

F. W. EARNSHAW, *Cashier*.

Ex. B.

Form 21.

329

Ex. "C."

Reconcilements should be signed by an officer of the bank.

First Nat'l Bank, Okeana, Ohio.

MAR. 1, 1912.

Second National Bank, Cincinnati, Ohio:

Your account current to Feb. 29, '12, showing a balance of \$4,107.19 due us, agrees with our books, with the exceptions noted below.

Yours respectfully,

F. W. EARNSHAW, *Cashier*.

Ex. C.

Form 21.

330

Ex. "D."

Reconcilements should be signed by an officer of the bank.

First Nat'l Bank, Okeana, Ohio.

APR. 2, 1912.

Second National Bank, Cincinnati, Ohio:

Your account current to Mar. 31, '12, showing a balance of \$4,339.56 due us, agrees with our books, with the exceptions noted below.

Yours respectfully,

F. W. EARNSHAW, *Cashier*.

Ex. D.

Form 21.

331

Ex. "E."

Reconcilements should be signed by an officer of the bank.

First Nat'l Bank, Okeana, Ohio.

APR. 18, 1912.

Second National Bank, Cincinnati, Ohio:

Your account current to Apr. 13, '12, showing a balance of \$25.12 due us, agrees with our books, with the exceptions noted below.

Yours respectfully,

F. W. EARNSHAW, *Cashier.*

Ex. E.

Form 21.

332

Ex. "F."

Reconcilements should be signed by an officer of the bank.

First Nat'l Bank, Okeana, Ohio.

MAY 1, 1912.

Second National Bank, Cincinnati, Ohio:

Your account current to Apr. 30, '12, showing a balance of \$26.48 due us, agrees with our books, with the exceptions noted below.

Yours respectfully,

F. W. EARNSHAW, *Cashier.*

Ex. F.

Form 21.

333

Ex. "G."

Reconcilements should be signed by an officer of the bank.

First Nat'l Bank, Okeana, Ohio.

JUN. 4, 1912.

Second National Bank, Cincinnati, Ohio:

Your account current to May 31, '12, showing a balance of \$26.48 due us, agrees with our books, with the exceptions noted below.

Yours respectfully,

F. W. EARNSHAW, *Cashier.*

Ex. G.

Form 21.

334

Ex. "H."

Reconcilements should be signed by an officer of the bank.

First Nat'l Bank, Okeana, Ohio.

JULY 5, 1912.

Second National Bank, Cincinnati, Ohio:

Your account current to June 29, showing a balance of \$26.48 due us, agrees with our books, with the exceptions noted below.

Yours respectfully,

F. W. EARNSHAW, *Cashier.*

Ex. H.

335

Purchases and Sales.

Second National Bank Stock.

Dec., 1911, to Apr., 1912.

Dec., 1911.....	No record of any transactions.
Jan. 15, '12.....	2 shares at 220
" 16,	6 " " 215
" 17,	50 " " 215
" 18,	30 " " 221
" 31,	5 " " 225
Feb. 14,	10 " " 210
" 24,	10 " " 198
" 26,	10 " " 215
March 6,	10 " " 215
" 6,	2 " " 200
" 8,	5 " " 210
" 8,	5 " " 198
" 13,	5 " " 200
" 13,	3 " " 195
" 16,	3 " " 200 $\frac{1}{2}$
" 21,	6 " " 190
" 23,	4 " " 185
" 25,	5 " " 175
" 25,	4 " " 185

Id. "I."

Id. "J."

(Here follows report, marked page 336.)

CHARTS

TOO

LARGE

FOR

FILMING

337 *Notice of Filing of Bill of Exceptions Issued to Sheriff.*

June 14, 1915.

No. 55567.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,
vs.
THE SECOND NATIONAL BANK OF CINCINNATI, OHIO.

Mr. George F. Schott, Sheriff of Hamilton County, Greeting:

You are hereby commanded to forthwith notify Dennis F. Cash and Edward P. Moulinier, attorneys for plaintiff, that the attorneys for defendant have in the above entitled case, filed a bill of exceptions to the overruling of motion which was made by the Court on the 10th day of May, 1915, in said case.

Sec. 5301 R. S. as amended April 25, 1904, requires that any objection or amendment to the bill of exceptions must be filed in the cause within ten days after this notice.

Witness my hand and the seal of said Court at Cincinnati, this 14th day of June, 1915.

[SEAL.]

A. E. B. STEPHENS,
Clerk of Superior Court,
By ALBERT SWING, Deputy.

June 16, 1915.

Notice of Filing of Bill of Exceptions Returned.

CINCINNATI, June 16, 1915.

Served the within named Dennis F. Cash and Edward P. Moulinier, attorneys for plaintiff, by delivering a true copy of this writ with all the endorsements thereon personally to each of them, at 10:15 o'clock A. M.

GEORGE F. SCHOTT,
Sheriff Ham. Co., O.,
By GEO. PAUL, Deputy.

1915, June 28, Bill of exceptions transmitted to Judge S. W. Merrell.

1915, July 2, Bill of exceptions received from Judge S. W. Merrell endorsed "Allowed."

- 338 Pleas at the City of Cincinnati, County of Hamilton, State of Ohio, in the Term of January, A. D. 1916, of the Court of Appeals of Hamilton County held by Honorable S. S. Richards, Hon. Charles E. Chittenden and Hon. R. R. Kinkade, Judges of said Court of Appeals, at the Court House in the City of Cincinnati, County and State aforesaid.

No. 726.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO, a Banking Association Organized and Existing under the Laws of the United States of America, Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF OKEANA, OHIO, a Banking Association Organized and Existing under the Laws of the United States of America, Defendant in Error.

Petition in Error.

Be it remembered, that on the 15th day of July, A. D. 1915, came the above named Plaintiff in Error, by its Attorneys, and filed in the Office of the Clerk of said Court, its certain petition in error herein against the above named Defendant in Error, clothed in words and figures following to-wit:

The plaintiff in error The Second National Bank of Cincinnati, Ohio, is an association organized and existing and doing business under the National Banking Act of the United States with its principal place of business in the City of Cincinnati, County of Hamilton, and State of Ohio.

The Plaintiff in error says that in a case heretofore pending in the Superior Court of Cincinnati, Ohio, wherein this plaintiff in error was defendant and this defendant in error was plaintiff, being case #55567 on the docket of said Court, the defendant in error The First National Bank of Okeana, Ohio, on May 10, 1915, during the May, 1915, Term of said Court obtained judgment by the consideration of said Superior Court of Cincinnati, Ohio, against this plaintiff in error in the sum of five thousand eight hundred and ninety-nine (\$5,899) dollars, a certified copy of the docket and journal entries in said Court showing the judgment complained of herein together with all the pleadings, records and proceedings including the bill of exceptions taken in said cause are filed herewith and made a part hereof.

The plaintiff in error states that said Superior Court by rendering said judgment against it deprived this plaintiff in error of substantial justice and committed errors prejudicial to the substantial rights of this plaintiff in error in the following particulars, to-wit:

First.

The petition does not state facts which show a cause of action.

Second.

The court below erred in overruling the demurrer of the plaintiff in error and by so doing deprived the plaintiff in error of a title, right, privilege or immunity claimed by the plaintiff in error under Sections 5134, 5136, 5155 and 5190 of the Revised Statutes of the United States, to which ruling of the court the plaintiff in error then and there duly excepted.

Third.

340 The court below erred in admitting evidence offered by the defendant in error, to which ruling of the court the plaintiff in error at the time duly excepted; and in some of said rulings deprived the plaintiff in error of a title, right, privilege, or immunity claimed by the plaintiff in error under Sections 5147, 5211 and 5239 of the Revised Statutes of the United States; and in some other rulings deprived plaintiff in error of a title, right, privilege or immunity claimed by plaintiff in error under Sections 5134, 5136, 5155 and 5190 of the Revised Statutes of the United States.

Fourth.

The court below erred in rejecting evidence offered by plaintiff in error, to which ruling of the court plaintiff in error duly excepted.

Fifth.

The Court below erred in refusing to grant a motion made on behalf of the plaintiff in error at the close of defendant in error's evidence to instruct the jury to return a verdict for the plaintiff in error, to which ruling of the court the plaintiff in error duly excepted.

Sixth.

The court below erred in refusing to grant a motion made on behalf of plaintiff in error at the close of defendant in error's evidence to instruct the jury to return a verdict for the plaintiff in error and by said ruling the court below deprived the plaintiff in error of a title, right, privilege, or immunity which said plaintiff in error claimed under Sections 5134, 5136, 5190 and 5155 of the Revised States of the United States.

341

Seventh.

The court below erred in refusing to grant a motion made on behalf of defendant at the close of all the evidence to instruct the jury to return a verdict for the plaintiff in error, to which ruling of the court the plaintiff in error duly excepted.

Eighth.

The court below erred in refusing to grant a motion made on behalf of plaintiff in error at the close of all the evidence to instruct

the jury to return a verdict for the plaintiff in error and by said ruling the court below deprived the plaintiff in error of a title, right, privilege or immunity which said plaintiff claimed under Sections 5147, 5211 and 5239 of the Revised Statutes of the United States; and further deprived plaintiff in error of a title, right, privilege or immunity claimed by plaintiff in error under Sections 5134, 5136, 5155 and 5190 of the Revised Statutes of the United States.

Ninth.

The court below erred in refusing to grant written instructions on matters of law to the jury which said written instructions were offered to the court, which the plaintiff in error requested the court to give to the jury when the evidence was concluded and before the argument to the jury was commenced to which ruling of the court below plaintiff in error at the time duly excepted.

Tenth.

The court below erred in its charge to the jury, to which the plaintiff in error excepted.

Eleventh.

In its charge to the jury the court below charged the jury 342 in such a way and in such a manner as to deprive the plaintiff in error of a title, right, privilege or immunity claimed by the plaintiff in error under Sections 5147, 5211, and 5239 of the Revised Statutes of the United States; and of another title, right, privilege or immunity claimed by the plaintiff in error under Sections 5134, 5136, 5155 and 5190 of the Revised Statutes of the United States, to which charge of the court plaintiff in error at the time duly excepted.

Twelfth.

The verdict of the jury is contrary to law.

Thirteenth.

The verdict of the jury is contrary to law in that it deprived the plaintiff in error of a title, right, privilege or immunity claimed by this plaintiff in error under Sections 5134, 5136, 5155 and 5190 of the Revised Statutes of the United States; and in that it deprived the plaintiff in error of a title, right, privilege or immunity claimed by the plaintiff in error under Section 5147, 5211 and 5239 of the Revised Statutes of the United States.

Fourteenth.

The court below erred in overruling the motion for a new trial filed by the plaintiff in error within three days of the verdict of the jury which said motion for a new trial should have been granted for the reasons therein assigned, to which ruling of the court the plaintiff in error duly excepted.

Fifteenth.

The court below erred in overruling the motion filed by plaintiff in error for judgment non obstante veredicto, which motion
 343 should have been granted for the reasons therein assigned to which ruling of the court plaintiff in error duly excepted.

Sixteenth.

Other errors apparent on the record to which errors the plaintiff at the time and times respectively duly excepted.

JELKE, CLARK & FORCHHEIMER,

PECK, SHARFER & PECK,

Attorneys for Plaintiff in Error.

Waiver of Summons in Error and Entry of Appearance of Defendant in Error.

Waiver of Summons in Error.

Summons in error is hereby waived and appearance of defendant in error entered.

DENNIS F. CASH,

EDWARD P. MOULINIER,

Attorneys for Defendant in Error.

Transcript of Docket and Journal Entries and original papers and bill of exceptions in Case No. 55567 Superior Court of Cincinnati filed July 15th, 1915.

Entered Jan. 31, 1916.

Min. B. 6, Judgment of Affirmance.

No. 726.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO, Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF OKEANA, OHIO, Defendant in Error.

This cause came on to be heard upon the petition in error and upon the bill of exceptions, pleadings, original papers, transcript and record of said case, and was argued by counsel, on consideration whereof the judgment of the Superior Court of Cincinnati is affirmed.

344 And an application for a rehearing having been made the Court on consideration thereof overrules same.

It is therefore considered that said defendant in error recover from said plaintiff in error his costs herein, but without penalty, since the court are satisfied that there was reasonable grounds for the appeal to this court.

It is hereby ordered that a special mandate be sent to the Superior Court of Cincinnati to carry this judgment into execution.

To all of which plaintiff in error excepts.

Entered Mar. 6, 1916.

Min. B, 11, Entry Finding that Questions Involving the Revised Statutes of the United States are Raised by the Record.

No. 726.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO, Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF OKEANA, OHIO, Defendant in Error.

Journal Entry.

Whereupon on motion of said plaintiff in error the court ordered to be certified this March 4, 1916, and made part of the record of this case and of the judgment of affirmance heretofore entered herein, that in the Superior Court of Cincinnati, Ohio, said plaintiff in error herein, defendant in said Superior Court, claimed that it was not liable by virtue of the provisions of Sections 5134, 5136, 5155 and 5190 of the Revised Statutes of the United States, because the transactions complained of and by reason of which liability was sought to be imposed against said plaintiff in error were ultra vires, and that said plaintiff in error excepted to the charge to the jury and to the admission of testimony claiming that said charge and testimony deprived plaintiff in error of a title, right, privilege or immunity under said sections of the Revised statutes of the United States; and further claimed that there was no liability to be imposed on said plaintiff in error herein by virtue of the provisions of Sections 5147, 5211 and 5239 of the Revised Statutes of the United States, and that said plaintiff in error excepted to the admission of testimony and to the charge of the jury claiming that said testimony and charge deprived it of titles, rights, privileges or immunities granted to it by said sections of the Revised Statutes of the United States.

It is further certified that said plaintiff in error set up in its petition in error asking the reversal of the judgment of the Superior Court of Cincinnati, Ohio, that the proceedings of said Superior Court had theretofore deprived said plaintiff in error of a title, right, privilege or immunity claimed by said plaintiff in error under Sections 5134, 5136, 5155, and 5190 of the Revised Statutes of the United States, claiming in said petition in error by virtue of said sections of the Revised Statutes of the United States that it was under no liability herein because the judgment of said Superior Court imposed a liability upon said plaintiff in error because of an ultra vires act, and that said judgment of affirmance imposed a liability upon said plaintiff in error notwithstanding the title, right,

privilege or immunity claimed by said plaintiff in error under said sections of the Revised Statutes of the United States.

It is further certified that said plaintiff in error set up in its petition in error asking for a reversal of the judgment of the Superior Court of Cincinnati, that the proceedings of said Superior Court had theretofore deprived said plaintiff in error of titles, rights, privileges or immunities claimed by said plaintiff in error by virtue of Sections 5147, 5211 and 5239 of the Revised Statutes of the United States, and that said judgment of affirmance imposed a liability upon plaintiff in error notwithstanding the titles, rights, privileges or immunities claimed by said plaintiff in error by virtue of the provisions of said sections of the Revised Statutes of the United States. All as shown by the record in said case.

S. S. RICHARDS,

Presiding Judge.

CHAS. E. CHITTENDEN,

R. R. KINKADE.

Certified Copy of Entry from Supreme Court.

• Filed March 8th, 1916.

THE SECOND NATIONAL BANK OF CINCINNATI

VS.

THE FIRST NATIONAL BANK OF OKEANA.

Motion for an Order Directing the Court of Appeals of Hamilton County of Certify its Record.

It is ordered by the court that this motion be, and the same hereby is, overruled.

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Records of said Court, to-wit: from Journal No. 27, Page 259.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Supreme Court this 7th day of March, A. D. 1916.

[SEAL.]

FRANK E. McKEAN, *Clerk.*

By SEBA H. MILLER, *Deputy.*

Court of Appeals, Hamilton County, Ohio.

Before Judges Richards, Chittenden, and Kinkead, of the Sixth District.

C. A. No. 726. S. C. No. 55567.

January 22, 1916.

THE SECOND NATIONAL BANK OF CINCINNATI

vs.

THE FIRST NATIONAL BANK OF OKEANA.

Error to the Superior Court.

Peck, Shaffer and Peck and Jelke, Clark and Forchheimer, for plaintiff in error.

Denis F. Cash and Edward P. Moulinier, for defendant in error.

RICHARDS, J.:

This action was commenced in the Superior Court of Cincinnati by The First National Bank of Okeana for the purpose of recovering against the defendant sums of money claimed to have been deposited with the defendant bank for the purpose of being loaned by it on good collateral security. The trial resulted in a verdict and judgment in favor of the plaintiff for \$5,899.00. It is not claimed that the verdict so rendered is so manifestly against the weight of the evidence as to require a reversal, but it is urged that numerous errors of law occurred at the trial, to the prejudice of the defendant below, which do require a reversal of the judgment entered on the verdict.

It will not be necessary, in order to dispose of the questions, to state in detail the facts involved in the litigation, but only such facts as are material to an understanding of the issues. The Second National Bank of Cincinnati, hereinafter known as The Cincinnati Bank, was engaged in a part of its business in loaning 348 funds for country banks. Among the banks which it so served was the plaintiff below, The First National Bank of Okeana, hereinafter called The Okeana Bank. The Okeana Bank had deposited large sums with the Cincinnati Bank for the purpose of having these funds loaned on good collateral security, and among the loans made by The Cincinnati Bank for The Okeana Bank was one of \$2,500 made in December, 1911, to one E. E. Galbraith, who was the president of the Cincinnati Bank, and a loan of like amount, made in January, 1912, to I. Doyle, who was a stenographer in that bank. Stock of the Cincinnati Bank was hypothecated as collateral to secure these loans. The Cincinnati Bank, without

the knowledge of the Okeana Bank, had been directed by the Controller of the Currency, long before these loans were made, to charge off as worthless a very large amount of its assets, and to not continue to publish the same among its list of assets in statements thereafter called for by the government. This order was disobeyed by The Cincinnati Bank and it failed and neglected to charge off worthless or depreciated assets as ordered, and continued to make financial statements, as called for by the government, which included all or substantially all of the assets which had been found to be of little or no value. The stock of The Cincinnati Bank was at that time selling in the market at prices varying, perhaps, from two hundred to two hundred and forty dollars a share, but its intrinsic value was very little. All of these facts were, of course, known to The Cincinnati Bank. Not only did that bank publish

349 these statements, as called for by the government, showing its assets to not be depleted but it caused to be prepared and published and distributed a synopsis giving the substance of these official statements, in pamphlet form. The Okeana Bank had knowledge of the official statements published by The Cincinnati Bank and also had knowledge of the circular issued by that bank showing its financial condition.

It had no knowledge of the financial worth of Galbraith nor of Doyle. The Cincinnati Bank promptly reported the loans to The Okeana Bank when made, but failed to convey any information as to the actual or intrinsic value of its stock, and no objection was made at that time by The Okeana Bank to these loans. Regular statements were thereafter made by The Cincinnati Bank of the condition of the account with The Okeana Bank, and it is contended that the furnishing of these statements by the one bank and their reception, without any objection thereto, by the other bank, amounts to an account stated and that, therefore, the plaintiff was not entitled to recover. We cannot assent to the claim that the evidence discloses an account stated such as would bar the plaintiff from recovery, for it is apparent that the plaintiff was not fully advised as to the worthlessness of the stock of The Cincinnati Bank. That bank was placed in process of liquidation and the stock was demonstrated to be of little or no value at the time of the transactions involved in this action.

It is urged that the trial court erred in excluding evidence 350 of the market value of the stock of The Cincinnati Bank.

The evidence in this case makes it clear to the court that the marked value of this stock at the time the loans were made was largely based upon the false and fraudulent statements which were published by the officials of the bank, and it would be highly improper to allow the market value thus fixed to establish the true value of the stock. The transaction was by the bank itself which, of course, had full knowledge of the facts affecting the value of its stock, and it would be under those circumstances the actual and intrinsic value, rather than the wrongful inflated market value, which should be used as a criterion of this case. We hold, therefore, that the trial court committed no error in excluding evidence

as to the market value of the stock. The principle was directly involved in the case of *Hindman v. National Bank*, 112 Fed., 931. In that case Judge Lurton, speaking for the court, announced the rule to be that where the plaintiff had been induced to purchase shares of stock in reliance upon untrue representations, the real, intrinsic value of such shares should be considered and not the market price.

Counsel for plaintiff in error contend that the conduct of The Cincinnati Bank was ultra vires and that, for this reason, it is not liable in this action. Even if we should assume that the transaction was beyond the authority of a national bank, it would not follow that plaintiff would be thereby debarred from a recovery, and the contention can not be sustained.

It is claimed that the plaintiff was not entitled to recover for the reason that the record contains no evidence in the insolvency of Galbraith and Doyle. It does appear that Doyle was acting merely for the accommodation of Galbraith and had no actual interest in the transaction; but we can not assent to the claim that the record contains no evidence indicating the insolvency of Galbraith. Circumstances and incidents scattered through the record in many places would justify the jury in finding insolvency. But, aside from this question of insolvency, the contract between the two banks implied that The Okeana Bank wished to have its funds loaned on good collateral security, and that it was looking to the collateral rather than to the personal liability of those who might sign the obligations, and The Cincinnati Bank undertook to comply with the requirement that the funds should be so loaned on good collateral security. Under these circumstances The Okeana Bank on learning of the worthlessness of the stock of The Cincinnati Bank, had the right to repudiate the transaction and to hold the Cincinnati Bank for the amount wrongfully loaned on worthless collateral.

We are in accord with the contention in the brief of counsel for The Okeana Bank that this is not an action under the national banking act against the directors, nor is it a suit, in the strict sense of the term, for deceit, but it is an action against The Cincinnati Bank for a violation of the duty which it owed as an agent to its principal.

Counsel have discussed with much ability the rulings of the trial court on the admissibility of the evidence as to the published official statements made by The Cincinnati Bank, and whether The Okeana Bank had the right to rely thereon. In the view we take of this case we do not think that matter is of vital importance, for as already said, the case is simply one to recover of an agent who, by neglect or fraud, has failed to perform the duties, to-wit, to loan these funds on adequate collateral security.

We have examined the general charge of the court with care and find no error therein to the prejudice of The Cincinnati Bank.

Five several written requests were submitted by counsel for The Cincinnati Bank and asked to be given to the jury in charge before argument, and the refusal to give these in charge is assigned

as error. The trial court committed no error in refusing to instruct the jury as requested. The action in its last analysis is very simple and the plaintiff might well be entitled to recover on the mere default of its agent to perform the contract to loan the funds on good collateral security.

We have examined the remaining assignments of error, but they do not seem to require separate discussion.

Finding no prejudicial error, the judgment of the Superior Court will be affirmed.

Chittenden and Kinhead, JJ., concur.

Approved:

S. S. RICHARDS, *Judge*.

353

In the Supreme Court of the United States.

No. —.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO, an Association
Organized and Existing under the National Bank Act, Plaintiff in
Error,

vs.

THE FIRST NATIONAL BANK OF OKEANA, OHIO, an Association
Organized and Existing under the National Bank Act, Defendant
in Error.

Petition for Writ of Error to the Superior Court of Cincinnati, Ohio.

To the Honorable Edward Douglass White, Chief Justice of the United States, and to the Honorable William R. Day, Associate Justice of the Supreme Court of the United States and to the Other Justices of said Honorable Court and to the Honorable the Supreme Court of the United States:

The petition of The Second National Bank of Cincinnati, Ohio, which is an association organized and existing and doing business under the National Bank Act, with its principal place of business in the City of Cincinnati, County of Hamilton, and State of Ohio, respectfully shows:

I. Heretofore and on or about the 7th day of June, 1913, an action was commenced in the Superior Court of Cincinnati, Ohio, in the County of Hamilton, and State of Ohio, by The First National Bank of Okeana, Ohio, an association organized and existing under the National Bank Act, plaintiff, against your petitioner, defendant. The petition in said action alleged that the plaintiff and defendant each were banking associations organized under the laws of the United States of America, the plaintiff doing business and located at Okeana, Ohio, and the defendant at Cincinnati, Ohio, and
354 that the plaintiff kept a balance with the defendant such as is kept by country banks, like the plaintiff, with banks in large

reserve cities, like the defendant; and that as part of such business arrangement and in consideration thereof the defendant agreed to loan surplus funds deposited with it by plaintiff upon demand loans, secured by adequate collateral, and to account to plaintiff for such loans with interest; and that on or about the 9th day of December, 1911, defendant had the sum of Five Thousand Dollars (\$5,000.00) credited to the plaintiff to be so loaned by the defendant, and that defendant was directed by the plaintiff so to loan such sum; that on the 22nd day of July, 1912, the plaintiff demanded of the defendant the repayment of the sum of Five Thousand Dollars (\$5,000.00) with interest, which demand was refused by the defendant. Said petition prayed for a judgment against the defendant in the sum of Five Thousand Dollars (\$5,000.00) together with interest from the 9th day of December, 1911, and for an accounting by the defendant of the transactions above specified.

II. After a demurrer showing that the petition did not state facts which show a cause of action, because of the provisions of the laws of the United States, was overruled, your petitioner duly answered said petition denying that there was any consideration for the agreement set out in the petition, but alleging that it had loaned \$5,000.00, charging said sum to the account of said The First National Bank of Okeana, and that said loans and charges had been made pursuant to the instructions of said The First National Bank of Okeana; and that said loans and charges had been in all manner and respects and at all times fully ratified, approved and confirmed by said The First National Bank of Okeana. Subsequently the said The First National

Bank of Okeana filed a reply to said answer, which, as 355 amended, averred that your petitioner conspired with its then president, one E. E. Galbreath, to defraud the plaintiff, and in pursuance of said conspiracy, your petitioner had delivered to said Galbreath the sum of Twenty-five Hundred Dollars (\$2500.00), on December 9, 1911, taking a note signed and endorsed by said Galbreath, secured by fifteen (15) shares of your petitioner's capital stock; and that, thereafter, in further pursuance of said conspiracy, to wit, on the 5th day of January, 1912, your petitioner delivered to him the further sum of Twenty-five Hundred Dollars (\$2500.00) in exchange for a note signed and endorsed by one I. Doyle, who was one of your petitioner's employes, having no interest in said note, and signing the same upon the suggestion and request and for the accommodation of said E. E. Galbreath, said note being secured by twelve (12) shares of your petitioner's capital stock; and that at all of said times your petitioner knew that said E. E. Galbreath was insolvent, and that its capital stock was worthless. And plaintiff further alleged in its said reply that it had been defrauded into accepting said loans so secured by reason of the fact that your petitioner had, prior to the acceptance of such loans by plaintiff, published in the press certain sworn statements of its financial condition from which it appeared that your petitioner's stock was worth more than Two Hundred Dollars (\$200.00) a share; and that said statement was issued to deceive said The First National Bank of Okeana, and

did deceive said The First National Bank of Okeana into accepting said loans so secured; and that said statement was false inasmuch as the Deputy and Acting Comptroller of the Currency and his assistants had instructed your petitioner to remove a depreciation of its assets which would reduce its stock to the value of par.

III. Subsequently, to wit, on the 24th day of March, 1915, said cause came on for trial upon the issues so raised by said pleadings. Upon said trial, your petitioner objected to the admission of testimony on the ground that the admission of said testimony deprived your petitioner of rights given your petitioner by the National Bank Act, because the acts which such evidence tended to prove were ultra vires your petitioner, because by virtue of the National Bank Act your petitioner could not be liable in deceit to plaintiff in the case at bar for the acts which said testimony tended to prove, and because the acts proven showed a disobedience of the Comptroller of the Currency's order, which constituted a violation of the National Bank Act, which was in effect wilful, for which your petitioner could not be made to respond in damages by virtue of the provisions of the National Bank Act. Said objections were overruled by said Superior Court of Cincinnati, Ohio, and your petitioner duly excepted to the overruling of said objections. At the close of the plaintiff's testimony and at the close of all the testimony your petitioner requested said court to instruct the jury to return a verdict for your petitioner, which said Superior Court of Cincinnati declined and refused to do. The grounds of said motions were that all the evidence, even if true and regardless of any independent state ground, showed: (1) That your petitioner had committed an ultra vires act, for which your petitioner was not liable by virtue of the provisions of the National Bank Act; (2) The acts proven showed that, by virtue of the provisions of the National Bank Act, and under the circumstances of the case at bar, your petitioner was not responsible in deceit to the plaintiff; (3) Because the testimony proved that your petitioner had committed a violation of the National Bank Act, which was in effect wilful and for which, under the National Bank Act, your petitioner could not be made to respond in

357 damages; (4) Because the testimony proved that when the plaintiff accepted, approved and ratified said loans made on its behalf by the defendant that said plaintiff knew at all of said times that said defendant's president was purporting to act for said defendant in a transaction in which he had a personal interest, and that officers of national banks cannot bind the institution of which they are an officer to a transaction with a stranger where such stranger knows of said officer's personal interest in said transactions. After overruling said motions the Court charged the jury in such manner and to such effect that it submitted the cause to said jury in a way which permitted said jury to return a verdict against your petitioner for acts committed by your petitioner, which said acts could not subject your petitioner to damages by reason of the fact that your petitioner was not subjected to any liability for any of the acts proven since no liability could be imposed upon your petitioner, unless

not, by the publication of said statements have intended to induce said The First National Bank of Okeana to lend on the security of your petitioner's capital stock. And further your petitioner was subjected to liability for acts of its directors which constituted a violation of the National Bank Act in effect wilful, whereas, the National Bank Act provides that your petitioner's sole liability shall be a forfeiture of its charter where its directors commit such violation of said act. And further because it could not be liable since the First National Bank of Okeana at all times knew that the defendant's president had a personal interest in a transaction in which he was attempting to represent your petitioner, which knowledge charged said

358 First National Bank with notice of the alleged fraud which your petitioner's then president and your petitioner committed. And your petitioner at all times duly objected and excepted to the submission of the cause to the jury in such a way. Subsequently the jury impanelled in said Superior Court of Cincinnati, Ohio, rendered a verdict against your petitioner in the sum of Fifty-eight Hundred and Ninety-nine Dollars (\$5899.00). Your petitioner moved said court to set aside said verdict on the grounds that it had charged the jury in such manner and to such effect that said jury might return a verdict against your petitioner, notwithstanding the fact that,

(1) The acts proven were ultra vires your petitioner.

(2) The National Bank Act makes it impossible for your petitioner to commit the fraud which such charge permitted the jury to find had been committed by your petitioner.

(3) The acts proven showed that your petitioner's directors had committed a violation of the National Bank Act in effect wilful, for which said Act exempted your petitioner from liability in damages.

(4) The First National Bank of Okeana at all times knew that your petitioner's then president had a personal interest in the transaction in which he purported to represent your petitioner, which knowledge charged said First National Bank with notice of all alleged fraud which your petitioner's then president and your petitioner committed.

Your petitioner further moved said court to set aside said verdict because it had permitted the jury to consider incompetent testimony which had subjected your petitioner to liability for an ultra vires act; for a fraud which it could not commit by reason of the provisions of said National Bank Act, and to damages for a violation of the

359 National Bank Act which was in effect wilful, whereas, by the provisions of said Act your petitioner could not be made to respond in damages for a fraud or for such violation of said Act, and for a fraud which by law the First National Bank of Okeana was bound to know, since it knew that your petitioner's then president had a personal interest in a transaction in which he attempted to represent your petitioner, and for other reasons which your petitioner believed relieved it from liability under the Laws of the State of Ohio. Your petitioner further moved said Court for a judgment in its favor, notwithstanding said verdict on the ground that the verdict of the jury was contrary to law for all of said rea-

sons. The Superior Court of Cincinnati, Ohio, overruled said motions and rendered judgment against your petitioner, although your petitioner at all times prior and subsequent to the rendition of said judgment objected and excepted to its rendition on the ground that it was free from liability, because of the provisions of the National Bank Act, because the acts complained of were ultra vires your petitioner, because your petitioner was subjected to liability for a fraud which it could not commit by virtue of the provisions of the National Bank Act, because damages cannot be imposed upon your petitioner for a violation of the National Bank Act in effect wilful, and because your petitioner was subjected to liability for a fraud which the First National Bank of Okeana was bound in law to know, since it knew that your petitioner's then president had a personal interest in a transaction in which he attempted to represent your petitioner and for which fraud your petitioner, therefore, was not liable.

IV. Thereupon on or about July 15, 1915, your petitioner filed a petition in error in the Court of Appeals within and for the First

Appellate District of Ohio to reverse said judgment of said
360 Superior Court of Cincinnati, Ohio. Said petition in error

duly came on for argument before said Court of Appeals and your petitioner, through its counsel, duly argued that said judgment should be reversed because testimony was submitted to the consideration of the jury and the charge submitted the cause to the consideration of the jury, which said testimony and which said charge subjected your petitioner to liability for an ultra vires act, notwithstanding the provisions of the National Bank Act, because such testimony and such charge subjected your petitioner to liability for a fraud which by virtue of the provisions of said Act it could not commit, and because said testimony and said charge subjected your petitioner to liability for damages for a violation of the National Bank Act in effect wilful committed by your petitioner's then directors, whereas, the National Bank Act provides that your petitioner shall not be liable in damages for such a violation of said act, and because said charge subjected your petitioner to a liability for a fraud of which the plaintiff knew and in which it participated since it knew that your petitioner's then president attempted to represent your petitioner in a transaction in which he had a personal interest, and that judgment should be rendered for your petitioner for the reasons that all the testimony and all the issues involved in said cause subjected your petitioner to liability for an ultra vires act in spite of the provisions of the National Bank Act, and that said testimony and issues subjected your petitioner to a liability for a fraud which it could not commit by reasons of the provisions of the National Bank Act; and further, for the reason that all of said testimony and issues showed only a violation in effect wilful of the National Bank Act committed by your petitioner's then directors, that the only liability imposed upon your petitioner by the provisions of said Act for such violation

said acts were *intra vires*, when in fact and in law the acts proven were all *ultra vires* your petitioner, and since your petitioner could is a forfeiture of its charter, and that the plaintiff knew and
361 participated in a fraud allegedly committed by your petitioner's then president, since it knew that he attempted to represent it in a transaction in which he had a personal interest. And your petitioner then in said Court of Appeals and previously in said court of the first instance insisted that it had certain titles, rights, privileges, and immunities under the Constitution and Statutes of the United States which relieved it from liability in said action.

V. Notwithstanding said immunities so claimed under the Constitution and Statutes of the United States said Court of Appeals affirmed said judgment on or about January 21, 1916. And on or about February 1, 1916, the record of said cause was returned to said Superior Court of Cincinnati, Ohio, with the mandate of said Court of Appeals affirming the judgment of said Superior Court of Cincinnati, Ohio.

VI. The Constitution and laws of the State of Ohio, as set forth in Article 4, Section 2, of said Constitution, and City of Akron v. Roth, 88 O. S., 456, provide that the Supreme Court of Ohio has no appellate jurisdiction over cases such as the case at bar, but that said Supreme Court of Ohio may in cases of public or great general interest direct any Court of Appeals to certify its record to said Supreme Court. Subsequently, to wit, on the 7th day of February, 1916, your petitioner applied to said Supreme Court of Ohio for an order directing said Court of Appeals for the First Appellate District of Ohio to certify its record on the ground that matters of public or great general interest were involved in the case at bar, and that error probably intervened in the judgment of said Court of Appeals. But said Supreme Court of Ohio overruled said motion to said Supreme Court, and declined to take jurisdiction over the case at bar.

VII. Upon said trial, and upon said petition in error, and upon said subsequent motion which was made in the Supreme
362 Court of Ohio your petitioner duly argued that the acts done by your petitioner were *ultra vires* and that it was not liable in deceit to The First National Bank of Okeana in the case at bar, for the publication of false statements required by the National Bank Act, by reason of the provisions of said National Bank Act. And further that your petitioner was subject to no liability in damages by reason of the publication of said statements, because said publications constituted a violation of the National Bank Act, which was in effect wilful, since said National Bank Act provides that the sole remedy against a National Bank Act for violation of its terms in effect wilful is a forfeiture of said National Bank's charter. Said decisions of said courts and judges and of each of them denied to your petitioner titles, rights, privileges and immunities held by your petitioner under the Constitution and Statutes of the United States.

Wherefore, your petitioner prays that a writ of error may be issued, and that it may be allowed to bring up for review before the Supreme Court of the United States the said order and judgment of said Superior Court of Cincinnati, Ohio, and that your petitioner

may have such other and further relief in the premises as may be just; and your petitioner will ever pray, etc.

THE SECOND NATIONAL BANK OF
CINCINNATI, OHIO.

C. A. SMOOT, *President*.

J. G. GUTTING, *Cashier*.

FERDINAND JELKE, JR.,

LANDON L. FORCHHEIMER,

Petitioners' Attorneys,

400 Union Trust Bldg., Cincinnati, Ohio.

363 STATE OF OHIO,

County of Hamilton, ss:

C. A. Bosworth, being duly sworn, deposes and says: I am President of The Second National Bank of Cincinnati, Ohio, the foregoing petitioner. The foregoing petition is true to my own knowledge.

C. A. SMOOT.

Sworn to before me this 24 day of April, A. D. 1916.

[Notarial Seal, Hamilton County, Ohio.]

RICHARD STANLEY LUCAS,

Notary Public in and for Hamilton County, Ohio.

363½ [Endorsed:] No. 55567. In the Supreme Court of the United States. The Second National Bank of Cincinnati, Ohio, etc., Plaintiff in Error vs. The First National Bank of Okeana, Ohio, etc., Defendant in Error. Petition for Writ of Error to the Superior Court of Cincinnati, O. Writ of error allowed but not to operate as a supersedeas. April 26, 1916. Malilov Pitney, Associate Justice, Supreme Court of the United States. Jelke, Clark & Forchheimer. Filed Apr. 27, 4.07 P. M., 1916. E. A. B. Stephens, Clerk of Court.

364 In the Supreme Court of the United States.

No. —.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO, an Association Organized and Existing under the National Bank Act, Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF OKEANA, OHIO, an Association Organized and Existing under the National Bank Act, Defendant in Error.

Prayer for Reversal.

To the Honorable Supreme Court of the United States:

And now comes The Second National Bank of Cincinnati, Ohio, the plaintiff in error, and prays for a reversal of the judgment of the

Superior Court of Cincinnati, Ohio, in the action brought by The First National Bank of Okeana, Ohio, against The Second National Bank of Cincinnati, Ohio, which was entered in the office of the Clerk of the Superior Court of Cincinnati, Ohio, on or about the first day of February, 1916. And it also prays for a reversal of the order of affirmance in said action by the Court of Appeals within and for the First Appellate District of Ohio entered in the office of the Clerk of said Court of Appeals on or about January 31, 1916. And it also prays for a reversal of the judgment of the Superior Court of Cincinnati, Ohio, in said action, entered in the office of the Clerk of said Superior Court on or about May 10, 1915.

FERDINAND JELKE, JR.,

LONDON S. FORCHHEIMER,

*Attorneys for The Second National Bank of
Cincinnati, Ohio. 400-408 Union Trust
Building, Cincinnati, Ohio.*

364½ [Endorsed:] No. 55567. In the Supreme Court of the United States. The Second National Bank of Cincinnati, Ohio, etc., Plaintiff in Error vs. The First National Bank of Okeana, Ohio, etc., Defendant in Error. Prayer of Reversal. Jelke, Clark & Forchheimer. Filed Apr. 27, 4.07 P. M., 1916. A. E. B. Stephens, Clerk of Court.

365 In the Supreme Court of the United States.

No. —.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO, an Association Organized and Existing under the National Bank Act, Plaintiff in Error.

VS.

THE FIRST NATIONAL BANK OF OKEANA, OHIO, an Association Organized and Existing under the National Bank Act, Defendant in Error.

Assignments of Error.

And now comes The Second National Bank of Cincinnati, Ohio, and makes and files this its assignment of error.

I. The Superior Court of Cincinnati, Ohio, erred in admitting testimony which tended to prove that The Second National Bank of Cincinnati, Ohio, had entered into an agreement with The First National Bank of Okeana, Ohio, whereby said The Second National Bank of Cincinnati, Ohio, agreed to pay interest at the rate of 2½% on said First National Bank's deposit and to lend surplus funds, deposited by said First National Bank with said Second National Bank, upon the instructions of said First National Bank, to be secured by adequate collateral; that pursuant to instructions received from said First National Bank, said Second National Bank loaned

\$2,500.00 to one E. E. Galbreath on December 9, 1911, said loan being secured by 11 shares of the capital stock of said Second National Bank, and that said Second National Bank did further lend \$2,500.00 on January 6, 1912, to one I. Doyle, an employee of said Second National Bank who signed said note for said E. E. Galbreath's accommodation, taking as security for said loan 12 shares

of the capital stock of said Second National Bank; that it is
 366 a universal custom for national banks in reserve cities to take call loans secured by adequate collateral for their country correspondents and charge the same to the account of such country correspondents; that said Second National Bank had been taking call loans secured by adequate collateral and charging such loans to the amounts of its country correspondents for ten years previous to the trial, and was doing so at the time of the trial; that said Second National Bank kept a special book in which it entered all call loans secured by collateral taken for its country correspondents and charged to their account, which book the national bank examiner might inspect if he wished in his periodic examinations; that on the back of the reports which said Second National Bank made to the Comptroller of the Currency on the forms furnished said bank by said Comptroller said bank reported call loans charged to the accounts of country correspondents in the following amounts on the following dates: January 7, 1911, \$397,561.82; March 7, 1911, \$644,962.00; June 7, 1911, \$463,349.80; September 1, 1911, \$502,575.00; December 5, 1911, \$396,250.00; that said Second National Bank published statements of its condition demanded by the Comptroller of the Currency showing that its capital stock had an actual value of more than \$200.00 a share, although the officers and directors of said bank had been informed and directed by the Comptroller of the Currency that there was a probable loss of \$2,000,000.00 from its assets, which would totally wipe out the value of its capital stock and surplus; that the only knowledge said First National Bank had concerning the value of the stock of said Second National Bank was acquired from said reports so published; that on April 15, 1912, the Comptroller of the Currency gave notice to said Second National

Bank of the impairment of its capital stock and directed its
 367 directors to make the same good; and that the stock securing the Galbreath and Doyle loans was sold pursuant to law at a premium of \$167.88; for the reason that all said testimony tended to show that said Second National Bank had entered into an agreement, ultra vires said Second National Bank by virtue of the provisions of Sections 5124, 5136, 5155 and 5190 of the Revised Statutes of the United States, with said First National Bank for the misfeasance of which said Second National Bank was not liable, and that said evidence was, therefore, incompetent, irrelevant and immaterial.

II. The Court of Appeals within and for the First Appellate District of Ohio erred in affirming said judgment for the reason that the Superior Court of Cincinnati had admitted such testimony which was incompetent, irrelevant and immaterial for the same reason.

III. The Superior Court of Cincinnati, Ohio, erred in admitting

testimony which was incompetent, irrelevant and immaterial proving that the Second National Bank of Cincinnati, Ohio, had received a letter from T. P. Kane, Deputy and Acting Comptroller of the Currency, dated March 4, 1911, which said letter informed said bank: that it had loaned the Ford and Johnston Company the sum of \$633,121.05; that said loan was not only in excess of the legal limit, but hazardous, that its officers had attempted to conceal a \$95,000.00 liability from the examiners, and criticized said Second National Bank's efforts to reduce and to secure said Ford and Johnson Company's indebtedness to said bank; stated that on the day of the last examination said bank held past due paper itemized therein and aggregating \$365,511.40, of which \$70,117.36 appeared to have been charged off, and informed said Bank that such was an unwarranted accumulation of past due paper; instructed said bank that items aggregating \$79,083.26 must be charged off, if still in the bank before the next examination; itemized loans amount-

368 ing to \$113,264.37, which it informed said Bank were very undesirable and should be collected as soon as possible; that it had loans itemized therein and aggregating \$254,802.44 which were very slow, and should have the closest attention with a view to their early elimination; called special attention to certain loans of \$190,982.83 to banks in the city of Birmingham, Alabama; informed said bank that said loans to said Birmingham Banks were regarded as a particularly hazardous indebtedness on which said examiner believed a heavy loss would be sustained; criticized other extended and itemized lines aggregating \$483,648.82, and estimated that there would be a loss of \$38,000.00 on items in the schedule of bonds, securities, etc.; informed said bank that its condition must be regarded as very unsatisfactory and that its estimated losses, questionable assets, and other assets which, for one reason or another, were subject to criticism, aggregated nearly \$2,000,000.00, and that many of the objectionable loans were of long standing and appeared to be in worse condition than ever before, and informed said bank that immediate and effective measures must be taken to restore said bank to a safe and satisfactory basis. That the Board of Directors of said Second National Bank on May 29, 1911, ordered \$16,591.17 charged off; that on October 18, 1911, said Directors ordered \$52,029.96 charged off; that on February 23, 1912, the Directors authorized and instructed the officers to charge to surplus account and credit to profit and loss account \$500,000.00 on or before March 15, 1912, in addition to certain itemized assets, including call loans, time loans, bonds and stocks, and a cash item, aggregating \$601,405.22; resolving that thereafter all obligations of said bank be shown on the general statement book; on April 6, 1912, the Directors authorized and instructed the officers to charge to profit and loss account

369 \$250,000.00, and itemized paper aggregating \$242,617.05; evidence showing that practically none of said items were in fact charged to profit and loss account until February 24, 1912. And that said bank published statements in The Cincinnati Enquirer on January 11, 1911, showing capital and surplus \$2,000,000.00, undivided profits \$210,498.03 at the close of business on Jan-

uary 7, 1911; March 10, 1911, capital and surplus \$2,000,000.00, undivided profits \$211,268.64 at the close of business on March 7, 1911; June 10, 1911, capital and surplus \$2,000,000.00, undivided profits \$143,344.71 at the close of business on June 7, 1911; September 6, 1911, capital and surplus \$2,000,000.00, undivided profits \$106,874.31 at the close of business on September 1, 1911; December 8, 1911, capital and surplus \$2,000,000.00, undivided profits \$113,041.07 at the close of business on December 5, 1911. For the reason that said testimony showed that the officers and directors of said Second National Bank had committed a violation of the National Bank Act, which was in effect wilful. Such statements are required by Section 5211 of the Revised Statutes of the United States. Section 5239 of the Revised Statutes of the United States provides that the Directors of an association organized under the National Bank Act who knowingly violate or knowingly permit any officers, etc., of the association to violate any provisions of said Act shall be held liable in their personal and individual capacity for all damages which anybody shall sustain in consequence of such violation, and that all the rights of the association whose Directors committed such violation of said act shall be forfeited and that said section of said statutes exempts such an association from liability for damages for such violation of said act.

IV. The Court of Appeals within and for the First Appellate District of Ohio erred in affirming the judgment for the reason that such evidence was incompetent, irrelevant and immaterial, because of said provisions of the National Bank Act.

370 V. The Superior Court of Cincinnati, Ohio, erred in admitting testimony, which said testimony was incompetent, irrelevant, and immaterial since it showed that The Second National Bank of Cincinnati, Ohio, had received a letter from T. P. Kane, Deputy and Acting Comptroller of the Currency dated March 4, 1911, which said letter informed said bank: that it had loaned the Ford and Johnson Company the sum of \$633,121.05, that said loan was not only in excess of the legal limit, but hazardous, that its officers had attempted to conceal a \$95,000.00 liability from the examiners, and criticized said Second National Bank's efforts to reduce and to secure said Ford and Johnson Company's indebtedness to said bank; stated that on the day of the last examination said bank held past due paper itemized therein in the amount of \$365,511.40, of which \$70,117.36 appeared to have been charged off, and informed said Bank that such was an unwarranted accumulation of past due paper; instructed said bank that items aggregating \$79,083.26 must be charged off, if still in the bank before the next examination; informed said Bank that it had loans, specifically enumerated in said letter, amounting to \$113,264.37, which were very undesirable and should be collected as soon as possible; that it had loans itemized in said letter aggregating \$254,802.44 which were very slow, and should have the closest attention with a view to their early elimination; called special attention to loans of \$190,982.83 to banks in the city of Birmingham, Alabama; informed said bank that said loans to said Birmingham Banks were regarded as a particularly

hazardous indebtedness on which said examiner believed a heavy loss would be sustained; criticized other extended and itemized lines aggregating \$483,648.82, and estimated that there would be a loss of \$38,000.00 on items in the schedule of bonds, securities, etc.;

informed said bank that its condition must be regarded as
 371 very unsatisfactory and that its estimated losses, questionable assets, and other assets which, for one reason or another, were subject to criticism, aggregated nearly \$2,000,000.00, and that many of the objectionable loans were of long standing and appeared to be in worse condition than ever before, and informed said bank that immediate and effective measures must be taken to restore the bank to a safe and satisfactory basis. In admitting testimony to the effect that the Board of Directors of said Second National Bank on May 29, 1911, ordered \$16,591.17 charged off; that on October 18, 1911, said Directors ordered \$52,029.96 charged off; that on February 23, 1912, the Directors authorized and instructed the officers to charge to surplus account and credit to profit and loss account \$500,000.00 on or before March 15, 1912, in addition to itemized assets, including call loans, time loans, bonds and stocks, and a cash item aggregating \$601,405.22; and resolving that hereafter all obligations of said bank be shown on the general statement book; on April 6, 1912, the Directors authorized and instructed the officers to charge to surplus and credit to profit and loss \$250,000.00, and itemized paper aggregating \$242,617.05. Evidence showing that none of said items were in fact charged to profit and loss account until February 24, 1912. And that said bank published statements in The Cincinnati Enquirer on January 11, 1911, showing its capital, surplus and undivided profits to be: capital and surplus \$2,000,000.00, undivided profits \$210,498.03 at the close of business on January 7, 1911; March 10, 1911, capital and surplus \$2,000,000.00, undivided profits \$211,268.64 at the close of business March 7, 1911; June 10, 1911, capital and surplus \$2,000,000.00, undivided profits \$143,344.71 at the close of business June 7, 1911; September 6, 1911, capital and surplus \$2,000,000.00, undivided profits \$106,874.31 at the close of business September 1, 1911, December 8, 1911,
 372 capital and surplus \$2,000,000.00, undivided profits \$113,041.00 at the close of business December 5, 1911. Evidence

that The First National Bank of Okeana read said statements before it accepted the loans to Galbreath and Doyle, and that it accepted said loans only because it believed that said statements showing the value of the capital stock of The Second National Bank to be more than \$200.00 a share were true and that it never expected the makers of said notes to pay the the same, but relied solely on the value of the collateral as a means of reimbursing itself for the sums loaned to Galbreath and Doyle. Evidence that on April 15, 1912, the Comptroller of the Currency gave notice to said Second National Bank of an impairment of 100% in its capital stock and directing its Directors to make good said impairment, and that the stock securing said Galbreath and Doyle loans had been sold pursuant to law at a premium of \$167.88, for the reason that said statements on which said First National Bank relied were required to be published

by Section 5211 of the Revised Statutes of the United States, which does not subject the association publishing such statements to liability in deceit since it is not within the purview of said section that the association publishing the statements demanded by said section shall intend by said publication to give the stock belonging to the stockholders of such association a large value as security for demand loans.

VI. The Court of Appeals within and for the First Appellate District of Ohio erred in affirming the judgment for the reason that such evidence was incompetent, irrelevant and immaterial, because of which no liability could be imposed on said defendant.

VII. The Superior Court of Cincinnati, Ohio, erred in overruling defendant's motions to instruct the jury to return a verdict for the defendant made at the close of the plaintiff's testimony, and again at the close of all the testimony for the reason that the testimony showed that the defendant had assumed an agreement *ultra vires* by reason of Sections 5134, 5136, 5155 and 5190 of the Revised Statutes of the United States for the misfeasance of which no liability could be imposed on said defendant.

VIII. The Court of Appeals within and for the First Appellate District of Ohio erred in affirming said judgment for the same reason.

IX. The Court of Appeals within and for the First Appellate District of Ohio erred in not rendering final judgment for The Second National Bank of Cincinnati, Ohio, for the same reason.

X. The Superior Court of Cincinnati, Ohio, erred in overruling the defendant's motion made at the close of the plaintiff's testimony and again at the close of all the testimony to instruct the jury to return a verdict for the defendant for the reason that the testimony proved an in effect wilful violation of the provisions of the National Bank Act by the defendant's directors from which the defendant was exempted from liability in damages by virtue of the provisions of Section 5239 of the Revised Statutes of the United States.

XI. The Court of Appeals within and for the First Appellate District of Ohio erred in affirming such judgment for the same reason.

XII. The Court of Appeals within and for the First Appellate District of Ohio erred in not rendering a final judgment for The Second National Bank of Cincinnati, Ohio, for the same reason.

XIII. The Superior Court of Cincinnati, Ohio, erred in overruling the defendant's motions made at the close of the plaintiff's testimony and again at the close of all the testimony to instruct the jury to return a verdict for the defendant for the reason that

it was not within the purview of Section 5211 of the Revised Statutes of the United States that an association publishing statements demanded by said section of said Statutes shall, by such publication, intend to give to holders of the capital stock of such association certificates of stock which have a large value as security for demand loans.

XIV. The Court of Appeals within and for the First Appellate District of Ohio erred in affirming the judgment for the same reason.

XV. The Court of Appeals within and for the First Appellate

District of Ohio erred in not rendering final judgment for The Second National Bank of Cincinnati, Ohio, for the same reason.

XVI. The Superior Court of Cincinnati, Ohio, erred in overruling the motions of the defendant, made at the close of plaintiff's testimony and again at the close of all the testimony, to instruct the jury to return a verdict for the defendant for the reason that all the evidence showed that The First National Bank of Okeana, Ohio, took, ratified and affirmed the loans, knowing that the defendant's president had attempted to represent himself and the defendant in the same transactions, and for that reason said First National Bank was bound to know that said president could not represent the defendant in the transaction.

XVII. The Court of Appeals within and for the First Appellate District of Ohio erred in affirming the judgment for the same reason.

XVIII. The Court of Appeals within and for the First Appellate District of Ohio erred in not rendering judgment for the Second National Bank of Cincinnati, Ohio, for the same reason.

XIX. The Superior Court of Cincinnati, Ohio, erred in charging the jury as follows, to-wit:

"I will now take up with you the claims of the respective parties in this case." The plaintiff claims that early in the
375 year 1911 an agreement was entered into between the Okeana National Bank and the Second National Bank whereby the Okeana National Bank undertook to open an account and keep a deposit account with the Second National Bank, and the Second National Bank, in consideration of having the Okeana's deposit account opened with it, agreed to pay $2\frac{1}{2}\%$ interest on average balances in the deposit account, and also from time to time at the request of the Okeana Bank to make for it, the Okeana Bank, call loans secured by adequate collateral. By call loans are meant, of course, loans of money which the borrower undertakes to repay on demand, and by collateral is meant security given by the borrower to the lender to make good the borrower's obligation. The ordinary form of collateral is that of bonds or stocks, so endorsed or signed by the owner that a person into whose hands they rightfully come may sell them or realize upon them their value.

Upon the plaintiff, who alleges such an agreement to have been entered into, rests the burden of proving such an agreement, and as it is a contract which the plaintiff is called upon to prove, his proof must go to the essentials of a contract, namely, the meeting of the minds of both parties upon the same subject matter, and the terms of obligations resting upon each to be performed with reference to such subject matter and to show the consideration for the agreement moving from one party to the other. The consideration may consist in the mutual obligation undertaken by the parties.

I will say to you, however, that the existence of such a contract between the parties, if you find a contract to have been established upon the evidence, of the kind and in the terms claimed, will be considered by you only as bearing upon the relations existing between the two banks at the time of the making of the so-called Galbreath and Doyle loans. Whether or not you find
376

such a contract to have been entered into, you will nevertheless have to consider at the outset of your deliberations the relation existing at such a time, (that is, the time of the making of the loans), between the two banks. It is established by the evidence in the case that, at the time the Galbreath and Doyle notes were made and the money of the Okeana Bank paid therefor, the Okeana Bank had requested the Second National Bank to make call loans for it, and the Second National Bank had undertaken so to do. By reason of the Second National Bank undertaking to make such loans at the request of the Okeana National Bank, there arose between the parties the relation of principal and agent, that is to say, a relation wherein the Second National Bank was undertaking to perform the business of the Okeana Bank in making loans. One of the elements arising from this relation is the obligation upon the agent, here the Second National Bank, to perform the business of the agency, in this case the making of call loans upon collateral, with such care and such good faith as the relationship demanded, and if, upon the evidence in this case, you find that the relationship arose from the contract between the banks made for a consideration moving from the Okeana Bank to the Second National Bank, such finding of fact will be an element for your consideration in determining the duty of the Second National Bank in the premises.

In the case thus supposed, that of a contract between the parties, the Second National Bank would owe to the Okeana Bank the duty to exercise ordinary care, having in view the nature of the business, to inquire into and ascertain the adequacy of the collateral presented upon such call loans. Again in the case supposed, (still assuming that you should find a contract,) which, however, it is entirely for you to determine upon the evidence), it was the duty of the Second National Bank assuming to act as agent to communicate to its principal, the Okeana National Bank, any matter connected with the making of the loan and the adequacy of the collateral materially affecting the loan and its security.

377 If the Second National Bank assuming to loan the moneys of the Okeana National Bank upon the latter's request did so merely as an accommodation and convenience to the Okeana Bank, and without consideration moving to the Second National Bank, the Second National Bank would nevertheless be under the duty of exercising such care with respect to receiving adequate collateral as in view of the nature of the business would be exercised by ordinarily prudent persons in the banking business acting for others without pay and as a mere accommodation. And, under the state of facts last assumed, that is in the absence of a contract, the Second National Bank acting, if it did so act, gratuitously, and for the convenience of the Okeana Bank, would likewise be under the duty of communicating to its principal, the Okeana Bank, knowledge which it might have in respects materially affecting the business of the loan and materially affecting the sufficiency of the collateral security." * * * "As I have already stated, it is established by the evidence that the two loans referred to in defendant's answer were made, one being the so-called Galbreath loan and the other being the so-called Doyle loan,

and that the making of such loans was communicated to the Okeana National Bank. It also appears in evidence, and is undisputed, that such loans were approved by the Okeana National Bank, acting through its Board of Directors.

The plaintiff, however, claims that at the time each of these two loans was made and at the time the making of the loan
 378 was approved by the Okeana National Bank, it relied entirely upon the security or sufficiency of the Collateral attached to the Galbreath and Doyle notes; that at the time the loans were made and at the time they were ratified the Second National Bank knew that this collateral stock of the Second National Bank was worthless and that the Okeana Bank did not know this; that by reason of this state of affairs which the plaintiff claims to have existed, the Second National Bank failed in the duty which the plaintiff claims rested upon it (the Second National Bank) to disclose to the Okeana Bank the true value of the Second National's own stock. The plaintiff claims that the defendant, the Second National Bank, with intent to defraud and deceive the plaintiff did conceal and withhold from the plaintiff that the said stock was worthless, notwithstanding this alleged fact was well known to the Second National Bank, and that the latter also concealed the knowledge which it is charged to have had that the Comptroller of the Treasury had reported to the Second National Bank a depreciation in the assets of the bank. These being the plaintiff's claims, the plaintiff has the burden of proof of establishing such claims." * * * "At this point I may say to you that it is not in all cases necessary that a representation of value be expressed. Where a confidential relation exists between parties, one of whom is acting for or in behalf of another, there may be and in certain cases there does arise a duty on the part of the former to disclose or communicate to the latter material facts which the former is in good faith bound to disclose. Whether in the present case the relation of the Second National Bank to the Okeana Bank was of such confidential character with respect to the lending of the latter's funds, if so whether the knowledge of the Second National Bank, it is charged it had of the true value of its stock at the time of making these loans, was such as to require of the Second National
 379 Bank the disclosure of such knowledge, are questions of fact for the determination of the jury in the light of all the evidence. As I have said to you, the burden is upon the plaintiff to establish that at the time of the making of the Galbreath loan or the Doyle loan or either of them, the value of the Second National Bank stock was materially less than represented by the Second National Bank, and that at such time the Second National Bank knew that the stock had a value substantially less" * * * "If upon the evidence and under the law as stated to you, you should find for the plaintiff, you will then determine the amount of its damage," for the reason that said portions of said charge subjected The Second National Bank of Cincinnati, Ohio, to liability for an agreement ultra vires by virtue of Sections 5134, 5136, 5155 and 5190 of the Revised Statutes of the United States for the misfeasance of which said Second National Bank could not be made to respond in damages.

XX. The Court of Appeals within and for the First Appellate District of Ohio erred in affirming said judgment since said portions of the charge to the jury were erroneous for the same reason.

XXI. The Superior Court of Cincinnati, Ohio, erred in charging the jury as follows, to wit:

"The burden of proof, therefore, is upon the plaintiff, the Okeana National Bank, to establish that the defendant Bank, the Second National Bank, represented its stock was worth more than \$200.00 per share; that such representation was made by the Second National Bank to the Okeana National Bank with the intention on the part of the Second National Bank that the Okeana National Bank should rely thereon; that the plaintiff, the Okeana National Bank, did rely on such representations;" * * * "Such reports so published in the newspapers are made in pursuance of the law governing National Banks, but their purpose is also that of conveying information to those persons who contemplate dealing with the bank in which its financial condition enters as an essential. If you should find, by a preponderance of the evidence, that these statements, or other statements which were communicated directly to the Okeana Bank, if there were such statements so communicated, were read by the Okeana Bank acting through its officers, and that the Okeana Bank did rely thereon, and was justified under the circumstances in so relying, the Second National Bank would be responsible for loss directly resulting to the Okeana Bank by reliance upon such statements or communications, if such statements or communications were in fact false at the time they were made and were known by the Second National Bank to be false, and were intended to be acted upon." * * * "As to the question of whether or not such statements, or any of them, were intended by the Second National Bank to be acted upon, that among others is an element of proof incumbent upon plaintiff to be considered by you, and in its consideration you will take into account all of the facts appearing in evidence as to how and in what form the representations were made, the truth or falsity thereof, and the knowledge or want of knowledge of the Second National Bank, through its officers or agents, of the falsity of the representations, if, in fact, false when made, and in connection with these elements all other matters and circumstances disclosed in evidence." * * * "I have spoken of the element of proof that the plaintiff relied upon such statements as you may find to have been made. In this connection it must appear not only that the Okeana Bank relied on the sufficiency of the collateral, but that under all the circumstances it was justified in so doing. On this score, therefore, you will consider whether a banker of ordinary intelligence and prudence, situated as was the Okeana Bank, and standing in its relation to the Second National Bank, as that relation appears from the evidence, would have relied upon the representations made" for the reason that said portions of said charge subjected The Second National Bank of Cincinnati, Ohio, to liability for an agreement ultra vires by virtue of the provisions of Sections 5134, 5136, 5155 and 5190 of the Revised Statutes of the United States, and that said portions of said

charge subject said Second National Bank to a liability in deceit, whereas, by virtue of the provisions of Section 5211 of the Revised Statutes of the United States said bank could not intend to give its stockholders stock, value as collateral security for demand loans.

XXII. The Court of Appeals within and for the First Appellate District of Ohio erred in affirming said judgment because said portions of the charge to the jury were erroneous for the same reasons.

XXIII. The Superior Court of Cincinnati, Ohio, erred in charging the jury as follows, to wit:

"Upon the issue of the knowledge, if any, of the Second National Bank as to the true value of its capital stock at the time the Galbreath and Doyle loans were made, you may take into consideration the action of the Board of Directors of the Second National Bank with respect to the assets of the bank at times shortly preceding the making of the two loans referred to, and you may also take into consideration the letter of the Comptroller of the Treasury under date of March 4, 1911, to the Second National Bank with respect to the affairs of that bank. I will say to you,

382 however, that this letter of the Comptroller of March 4, 1911, referred to sometimes as the Kane letter, Kane being the Deputy Comptroller who signed the letter, is not to be taken by you as evidence of the actual condition of the finances and assets of the Second National Bank, but is to be considered only in so far as it may tend to throw light upon the knowledge of the Second National Bank as to its true financial condition and the true value of its stock at the time the Galbreath and Doyle loans were made"

* * * "Moreover, if you should find that false statements of the Bank's financial condition and of the value of its stock were made by the Bank through its officers and agents, and that such statements were made by the officers and agents of the Second National Bank in its behalf as statements of fact which they did not know to be fact, or if such statements were in fact false and made recklessly and without regard to whether they were in fact false or true, then such false statements will be of the same effect so far as the responsibility of the Bank is concerned as if made with knowledge of their falsity." * * * "If upon the evidence and under the law as stated to you, you should find for the plaintiff, you will then determine the amount of its damage. Plaintiff is entitled to recover, if entitled to an award at your hands, of a sum found by taking the difference between the amount of each loan when the same was made and the true value of the collateral (the Bank stock attached to the note) at such time. Upon the amount so found in the case of each separate loan, you will add simple interest at the rate of 6% per annum from the 1st day of February, 1912 (interest to that date having been paid), until the first day of this term of Court, March 1st, 1915. If in any award you may make you compute interest your verdict will be in a single sum inclusive of interest, if you award interest.

I have given the rule of damages as the difference between
383 the face amounts of the respective notes, which together are the amounts of the deposit of \$5,000.00, and the real

value of the collateral attached to each note at the time the loan was made. If you find for the plaintiff you will follow this rule, unless you should further find that, after the loans were made in December, 1911, and January, 1912, and until the time in April, 1912, when the Comptroller took official action with respect to the affairs of the Second National Bank, the collateral depreciated or fell in value, that is, between December and January and the date somewhere about the middle of April the collateral depreciated or fell in value between those dates, and that the Second National Bank at the time the loans were made had such knowledge of its own condition that it should have contemplated such subsequent depreciation, if any there was. Should you so find, the Second National Bank would be responsible to the Okeana Bank for depreciation in value of the collateral within the period mentioned. It would not be responsible should you find the facts otherwise," for the reasons that said portions of said charge subjected The Second National Bank to liability for an agreement ultra vires by virtue of Sections 5134, 5136, 5155 and 5190 of the Revised Statutes of the United States, subjected said bank to a liability for a fraud which it could not commit since the statements published and required by Section 5211 of the Revised Statutes of the United States were not published by said bank with the intention of inducing anybody to lend sums of money to its stockholders on the security of shares of stock in said bank, and that it subjected the Second National Bank of Cincinnati, Ohio, to liability in damages for a violation of the National Bank Act in effect wilful, committed by its officers or agents, whereas, by virtue of the provisions of said act The Second National Bank of Cincinnati, Ohio, is exempted for damages for such violation.

384 XXIV. The Court of Appeals within and for the First Appellate District of Ohio erred in affirming the judgment since said portions of said charge were erroneous for the same reasons.

XXV. The Superior Court of Cincinnati, Ohio, erred in refusing to instruct the jury as follows:

"If you find from the evidence that the plaintiff knew that E. E. Galbreath was the president of the defendant bank, and that the loans in question or either of them were for the benefit and personal interest of the said E. E. Galbreath, I charge you that the defendant cannot be held liable for any fraud of the said E. E. Galbreath in the making of any loan to himself in which he was personally interested to the knowledge of the plaintiff" by request so made in writing by the defendant before argument to the jury for the reason that said charge correctly stated the law applicable to the case at bar and correctly defined the obligations of persons dealing with the officers and agents of an association organized and existing under the National Bank Act.

XXVI. The Court of Appeals within and for the First Appellate District of Ohio erred in affirming said judgment because said special charge so requested should have been given for the same reason.

384½ [Endorsed:] No. 55567. In the Supreme Court of the United States. The Second Nat'l Bank of Cincinnati, Ohio, etc., Plaintiff in Error, vs. The First Nat'l Bank of Okeana, Ohio, Defendant in Error. Assignments of Error. Filed Apr. 27, 4.08 P. M., 1916. A. E. B. Stephens, Clerk of Court. Jelke, Clark & Forchheimer.

385 Know all men by these presents, That we, The Second National Bank of Cincinnati, Ohio, as principal, and The Fidelity & Casualty Company of New York, as surety, are held and firmly bound unto The First National Bank of Okeana, Ohio, in the full and just sum of Five Hundred (\$500) dollars, to be paid to the said The First National Bank of Okeana, Ohio, its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of April, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at a term of the Superior Court of the City of Cincinnati, State of Ohio, in a suit depending in said Court, between The Second National Bank of Cincinnati, Ohio, and The First National Bank of Okeana, Ohio, a judgment was rendered against the said The Second National Bank of Cincinnati, Ohio, and the said The Second National Bank of Cincinnati, Ohio, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The First National Bank of Okeana, Ohio, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said The Second National Bank of Cincinnati, Ohio, shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO,

By LANDON L. FORCHHEIMER,

Its Attorney. [SEAL.]

THE FIDELITY & CASUALTY OF NEW YORK,

By ALBERT W. WILLETT,

Attorney in Fact. [SEAL.]

Sealed and delivered in presence of—

J. N. COFTON.

J. N. COFTON.

Approved by—

MAHLON PITNEY,

*Associate Justice of the Supreme Court
of the United States.*

Filed April 27, 1916.

386 UNITED STATES OF AMERICA, *ss.*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Superior Court of Cincinnati, Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Superior Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Second National Bank of Cincinnati, Ohio, and The First National Bank of Okeana, Ohio, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the

387 Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said The Second National Bank of Cincinnati, Ohio, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-sixth day of April, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

Allowed, but not to operate as a supersedeas.

MAHLON PITNEY,

*Associate Justice of the Supreme Court
of the United States.*

[Endorsed:] 55567. Superior Court of Cincinnati. First National Bank of Okeana, Ohio, v. Second National Bank of Cincinnati, Ohio. Writ of Error. Filed Apr. 27, 4:05 P. M., 1916. A. E. B. Stephens, Clerk of Court.

[Endorsed:] 55567. Supreme Court of the United States, October Term, 1915. The Second National Bank of Cincinnati, Ohio, Plff in Error, vs. The First National Bank of Okeana, Ohio. Writ of Error. Filed Apr. 27, 4:09 P. M., 1916. A. E. B. Stephens, Clerk of Court.

388 In the Supreme Court of the United States.

No. —.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO, an Association
Organized and Existing under the National Bank Act, Plaintiff
in Error,

vs.

THE FIRST NATIONAL BANK OF OKEANA, OHIO, an Association
Organized and Existing under the National Bank Act, Defendant
in Error.

Citation on Writ of Error.

UNITED STATES OF AMERICA, ss:

To the First National Bank of Okeana, Ohio, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of the United States, wherein The Second National Bank of Cincinnati, Ohio, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Mahlon Pitney, Justice of the Supreme Court of the United States, this 26th day of April, in the year of our Lord one thousand nine hundred and sixteen.

MAHLON PITNEY,

Justice of the Supreme Court of the United States.

388½ [Endorsed:] No. 55567. In the Supreme Court of the United States. The Second National Bank of Cincinnati, Ohio, Plaintiff in Error, vs. The First National Bank of Okeana, Ohio, Defendant in Error. Citation on Writ of Error. Filed Apr. 27, 4:08 P. M., 1916. A. E. B. Stephens, Clerk of Court. Jelke, Clark & Forehheimer.

389 In the Supreme Court of the United States.

No. —.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO, an Association
Organized and Existing under the National Bank Act, Plaintiff
in Error,

vs.

THE FIRST NATIONAL BANK OF OKEANA, OHIO, an Association
Organized and Existing under the National Bank Act, Defendant
in Error.

Acceptance of Service of Citation.

I hereby, this 27th day of April, A. D. 1916, accept due personal service of the citation on the writ of error in the case wherein The Second National Bank of Cincinnati, Ohio, is plaintiff in error and The First National Bank of Okeana, Ohio, is defendant in error.

EDWARD P. MOULINIER,

Attorney for Defendant in Error.

389½ [Endorsed:] No. 55567. In the Supreme Court of the United States. The Second National Bank of Cincinnati, Ohio, etc., Plaintiff in Error, vs. The First National Bank of Okeana, Ohio, Defendant in Error. Acceptance of Service of Citation. Filed Apr. 27, 3:54 P. M., 1916. A. E. B. Stephens, Clerk of Court. Jelke, Clark & Forchheimer.

390 *Cost Bill, Clerk of Courts of Hamilton County.*

No. 55567.

FIRST NATIONAL BANK OF OKEANA, O.,

vs.

SECOND NATIONAL BANK OF CIN'TI.

	Dollars.	Cents.
Clerk	\$14.	03
Sheriff .....		.91
Witness Book		
Cost before M. C.		
Stenographer	24.	00
Sundries	2.	15
	<hr/>	
	41.	09
#726 C. of A.	14.	91
	<hr/>	
	56.	00
Transcript of Record	15.	00
	<hr/>	
	71.	00

Remarks: May 10/15 Judg't on Verdict for Pl'ff. 1/31/16.
Judg't Aff'd Mandate C. of A.

A. E. B. STEPHENS,
Clerk of Courts,

Per W. O. KEEFE, *Deputy.*

391 THE STATE OF OHIO,
Hamilton County, City of Cincinnati, ss:

Superior Court.

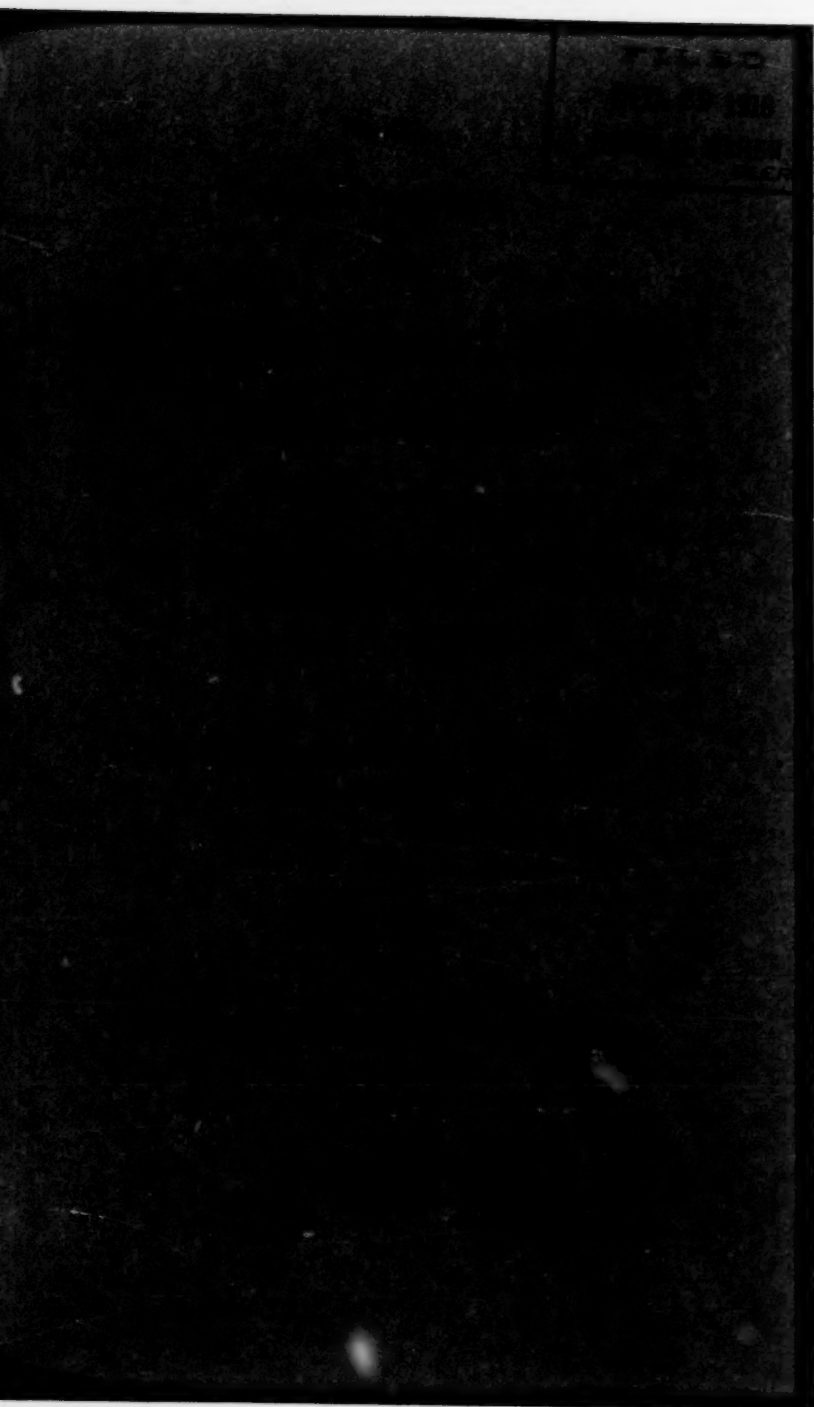
I, A. E. B. Stephens, Clerk of the Superior Court of Cincinnati, do hereby certify the within and foregoing to be a true and correct Transcript of the Record in the Case No. 55567, wherein The First National Bank of Okeana, Ohio, is Plaintiff and The Second National Bank of Cincinnati, Ohio, is Defendant, as appears from the files and records now in my office.

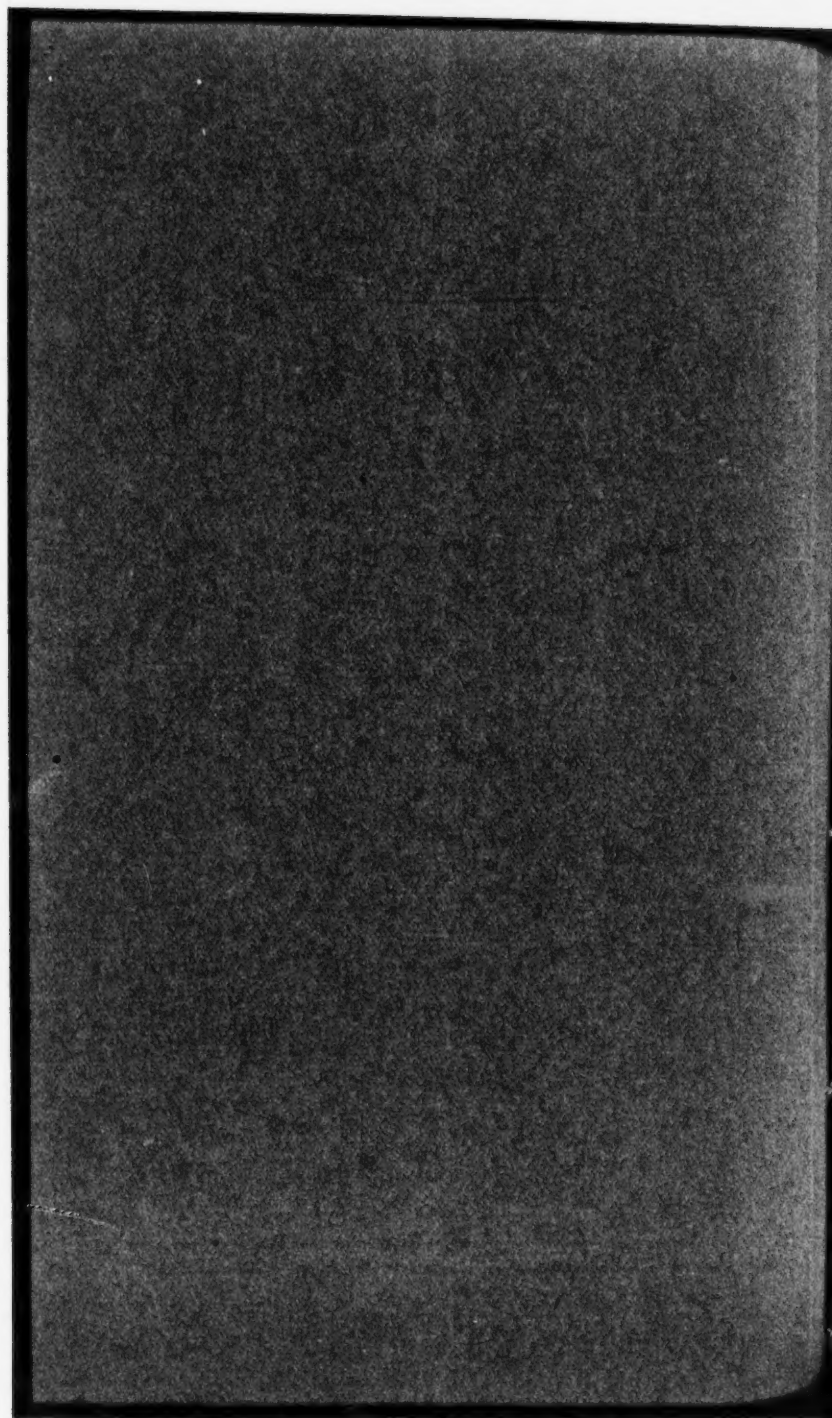
In Testimony Whereof, I have hereunto subscribed my name, and affixed the Seal of said Court, at Cincinnati, this twenty-second day of May, A. D. 1916.

[Seal Superior Court of Cincinnati.]

A. E. B. STEPHENS,
Clerk of the Superior Court of Cincinnati,
By W. L. GIESLER, *Deputy.*

Endorsed on cover: File No. 25,312. Ohio, Cincinnati Superior Court. Term No. 491. The Second National Bank of Cincinnati, Ohio, plaintiff in error, vs. The First National Bank of Okeana, Ohio. Filed May 24th, 1916. File No. 25,312.





No. 491

October Term, 1916

IN THE

Supreme Court of the United States

THE SECOND NATIONAL BANK OF
CINCINNATI, OHIO

Plaintiff in Error

vs.

THE FIRST NATIONAL BANK OF
OKEANA, OHIO

Defendant in Error

File No. 25,312

Brief for Plaintiff in Error

FERDINAND JELKE, Jr.
LANDON L. FORCHHEIMER

Attorneys for Plaintiff in Error



INDEX

	PAGE
Statement of the Case.....	1
Pleadings	1
Petition	2
Demurrer	2
Answer	2
Amended Reply	3
Testimony	5
Motions to Instruct the Jury to Return a Verdict for Defendant	10
Special Charge Requested and Refused.....	10
The Court's Charge to the Jury.....	11
Issue of Fraudulent Misrepresentations Sub- mitted to Jury.....	12
Defendant's Exception to Charge.....	14
Motions for New Trial and for Judgment <i>Non</i> <i>Obstante Verbo Dicto</i> Filed and Overruled....	15
Judgment Affirmed by Court of Appeals.....	15
Supreme Court of Ohio Refused to Take Jurisdiction in the Case.....	15
Specification of Errors Relied on and Intended to be Urged	16
A. (1) The Jury should have been instructed to Return a Verdict for the Defendant because of agreement between the Plaintiff and Defendant was <i>ultra</i> <i>vires</i>	16
(2) The Jury was Improperly Instructed as to Defendant's Duties because the agreement was <i>ultra vires</i>	16
(3) Error in admitting testimony because the transaction was <i>ultra vires</i>	18

	PAGE
B. (1) The Jury should have been instructed to Return a Verdict for Defendant because the National Bank Act gives no remedy in damages against the Defendant under the Circumstances proven in the case at bar.....	19
(2) The Jury was Improperly Instructed as to the Criterion of liability imposed upon Defendant under the National Bank Act	19
(3) The Testimony Erroneously Admitted because it did not prove Defendant to be under any Liability in Damages.....	20
C. (1) Jury Improperly Instructed because the Statement published could not be the Basis of an Action in Deceit.....	21
(2) Error in admitting Testimony because the Testimony did not subject Defendant to Liability	22
D. Error in refusing to give Special Charge to Jury	23
Argument	24
A. <i>Ultra Vires</i>	24
B. Defendant Exempted from the Liability in Damages by National Bank Act.....	32
C. Intent to Defraud not to be Imputed from Publication of Statement.....	36
D. Plaintiff charged with Knowledge of Alleged Fraud	39
Appendix	43

AUTHORITIES CITED.

- Barnet v. National Bank* (98 U. S. 558), 35.
Bishop v. Countess of Jersey (3 Drew, 163), 24.
Concord National Bank v. Hawkins (174 U. S. 364, 367), 26.
Dresser v. Traders National Bank (42 N. E. 567), 31.
First National Bank v. Hoch (89 Pa. St. 324), 31.
Grow v. Cockrill (63 Ark. 418, 36 L. R. A. 89), 24, 30.
Hasseltine v. Bank (183 U. S. 134), 35.
Ish v. Crane (13 O. S. 574), 27.
Logan County Bank v. Townsend (139 U. S. 67), 24.
McCormack v. Bank (165 U. S. 538, 549, 550), 28.
Merchants Nat. Bank v. Armstrong (65 Fed. 932, 936, 937), 37, 39.
Merchants National Bank v. Wehrmann (69 O. S. 161, 174; 202 U. S. 295), 29.
Monroeville v. Root (54 O. S. 523), 40.
Moore v. Bank (111 U. S. 156), 40.
Moore v. Citizens National Bank (15 Fed. 141), 40, 41.
Oates v. Bank (100 U. S. 239), 35.
Park Hotel v. First National Bank (86 Fed. 742, 744), 42.
Railroad v. Hawkins (64 O. S. 391), 40.
Scott v. Dewese (181 U. S. 282), 35.
Stephens v. Bank (111 U. S. 197), 35.
Thomas v. Taylor (224 U. S. 673), 33.
Weckler v. First National Bank of Hagerstown (42 Md. 581), 30, 31, 32.
Yates v. Jones National Bank (206 U. S. 158), 35, 36.
Yates v. Jones National Bank (240 U. S. 541), 33, 36.

Act of May 1, 1886, Chap. 73, § 2, Statutes at Large
 18, 25, 47

Ohio General Code, § 11447, par. 5.....	10, 39, 47
R. S. U. S., § 5134.....	24, 43
R. S. U. S., § 5136.....	23, 37
R. S. U. S., § 5138	45
R. S. U. S., § 5155	24, 45
R. S. U. S., § 5190.....	24, 45
R. S. U. S., § 5211.....	22, 26, 33, 36, 37, 45
R. S. U. S., § 5239.....	34, 35, 36, 46

No. 491.
October Term, 1916.

IN THE
Supreme Court of the United States

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO, <i>Plaintiff in Error,</i>	} File No. 25,312. <i>Brief for Plaintiff in Error.</i>
vs.	
THE FIRST NATIONAL BANK OF OKEANA, OHIO, <i>Defendant in Error.</i>	

STATEMENT OF THE CASE.

This cause is in this court on writ of error to the Superior Court of Cincinnati allowed by Mr. Justice Pitney and filed in said Superior Court on April 27, 1916.

The defendant in error herein was plaintiff in said Superior Court of Cincinnati and the plaintiff in error was defendant. For convenience we shall call the plaintiff in error herein defendant, and defendant in error plaintiff. In said Superior Court plaintiff obtained a jury verdict and a judgment thereon against defendant for \$5,899. This judgment was affirmed on error by the Court of Appeals for the First Appellate District of Ohio, and thereafter the Supreme Court of Ohio refused to take jurisdiction of the cause. Thereupon the record was remanded to said Superior Court for execution.

Plaintiff's petition, filed June 7, 1913, alleges that it and defendant are both national banks, plaintiff doing business at Okeana, Ohio, and the defendant at Cincinnati, Ohio; that the plaintiff had for a long time prior to December 9, 1911, kept a balance with the defendant such as is kept by country banks with banks in reserve cities like the defendant; that as a part of the business arrangement between plaintiff and defendant, and in consideration thereof, the defendant had agreed to lend surplus funds deposited with it by plaintiff, upon demand notes secured by adequate collateral, for the plaintiff, and account to the plaintiff therefor with interest thereon; that on December 9, 1911, when the plaintiff had \$5,000 on deposit with the defendant to be so loaned, plaintiff directed the defendant to procure loans to said amount; that the plaintiff had demanded the repayment of said sum of \$5,000 on the 22d day of July, 1912, and that the defendant had refused to repay said sum of \$5,000. The petition concludes with a prayer for judgment for \$5,000, together with interest from the 9th of December, 1911, and for an accounting.

On January 13, 1914, the defendant filed a general demurrer (R. p. 4) which set out that the petition did not state a cause of action because of the provisions of the laws of the United States. This demurrer was overruled, and exception reserved.

The defendant's answer, filed March 18, 1914, admits that the parties are both national banks doing business as alleged in the petition, but denies that there was any consideration for the agreement to lend plaintiff's surplus funds deposited with it. The answer further admits that it had \$5,000 credited to plaintiff on December 9, 1911, and alleges that it made a loan on December 9, 1911, of \$2,500 which it charged to plaintiff's

account and which it submitted to plaintiff, and which plaintiff in all respects approved, ratified and confirmed; and that defendant on January 5, 1912, made a loan of \$2,500, which it charged to the moneys deposited with it by plaintiff, and that this loan was also in all respects fully ratified, confirmed and approved by the plaintiff.

The plaintiff's amended reply, filed March 29, 1915, alleges that on December 9, 1911, and prior thereto, E. E. Galbreath was the defendant's president, and that at that time, as well as on the 12th of January, 1912, defendant and said Galbreath entered into a conspiracy to defraud the plaintiff of the sum of \$5,000, and that, in pursuance of the conspiracy, defendant fraudulently allowed Galbreath to borrow \$2,500 on a note payable and endorsed by Galbreath, and secured by fifteen shares of Galbreath's capital stock in the defendant. And that on the 5th of January, 1912, in further pursuance of the conspiracy, it fraudulently allowed Galbreath to borrow \$2,500 on a note payable and endorsed by one I. Doyle, who was one of the defendant's employes, with no real interest in the loan, who signed the note upon the suggestion, request and for the accommodation of Galbreath. That the second loan was secured by twelve shares of Galbreath's capital stock in the defendant; that Galbreath, to the defendant's knowledge, was insolvent, and that to the defendant's knowledge its capital stock was at that time worthless. The amended reply further alleges:

"That on or about the 11th day of January, 1911, and thereafter during said year 1911, the defendant published to the world and delivered to the plaintiff sworn statements of its financial condition, from which it appeared that the said defendant's stock was worth more than Two Hundred Dollars (\$200)

per share in value, and upon such statement it was intended by the defendant that the plaintiff should, and upon which the plaintiff did rely in its dealings with the defendant, but which statement was false and was known by the defendant to be, and its stock was then worthless and was known by the defendant to be, and that at the time of the making of the said loans, as aforesaid, to the said E. E. Galbreath, and the appropriation of the said moneys from the plaintiff's deposit accounts, as aforesaid, and the taking of the said stock as security, the defendant's bank shares were valueless, and that _____, the bank examiner appointed by the United States Comptroller of the Currency, had in the discharge of his duties as examiner, reported to the said Comptroller the facts of the depreciation of the assets of said bank, which depreciation, as reported subsequently, would be at the par value of said stock, and reduced the par value of said stock to nothing; that the said Comptroller had notified the said defendant bank that, unless said depreciation of assets was removed, and its full value replaced, he would be compelled to take such steps as to enforce the liquidation of the said bank; that the execution of said threat on the part of the Comptroller was, at the instance of the said defendant, stayed until the 8th day of April, 1912, and that on the 9th day of December, 1911, as well as on the 5th day of January, 1912, said defendant and said Galbreath, its president, with intent to defraud and deceive the plaintiff, did conceal and withhold from the plaintiff that said Galbreath was insolvent, and that the said stock was worthless, and that said Comptroller had taken the action as hereinbefore described, all of which was well known to the defendant, as aforesaid, and did thereby deceive and delude the plaintiff into accepting and approving the said loans, as aforesaid, to the said E. E. Galbreath." (R. pp. 11, 12.)

The amended reply further alleges that Galbreath has ever since December 9, 1911, been insolvent, and the stock ever since said date been worthless, and that by said disposition the defendant fraudulently diverted the sum of \$5,000 from the plaintiff.

The testimony shows that the plaintiff was a national bank doing business at Okeana, Ohio, a town in the western part of Butler County, and that defendant was a national bank doing business in Cincinnati, Ohio; that the plaintiff, in January of 1911, opened an account with the defendant, designating defendant as its reserve agent (Exhibit 5, R. 155), on which account the defendant, through its then vice-president, Galbreath, agreed to pay $2\frac{1}{2}$ per cent. on the average daily balance and from which the defendant agreed to make call loans for the plaintiff and charge the same to plaintiff's account; that the defendant loaned \$16,000 for plaintiff, including the loans complained of in the case at bar, from time to time, pursuant to plaintiff's directions, and charged said loans to plaintiff's account when made (Exhibits 6, 7, 8, 26, 29, 30, 31). That on December 9, 1911, it notified plaintiff that it had charged plaintiff's account with \$2,500 in exchange for a call loan made to one E. E. Galbreath (who at that time was known to plaintiff as defendant's president) (R. 40) secured by eleven shares of stock (R. 37) in the defendant belonging to said Galbreath. On January 5, 1912, \$2,500 was charged to plaintiff's account in exchange for a loan of \$2,500 to I. Doyle, secured by twelve shares of stock in the defendant belonging to said Galbreath. (Defendant admitted that Doyle signed the note for Galbreath's accommodation; that Galbreath got the money, and that Doyle had no real interest in the transaction.) And that on April 15, 1912, plaintiff was in-

formed that the Doyle loan was in fact a Galbreath loan (R. 46, 47).

The admission of evidence showing that defendant had performed such services for its country correspondents for ten years prior to the trial and was doing so at that time was objected to and exceptions duly reserved. All testimony showing or tending to show that defendant had undertaken to perform, and was performing, such services for plaintiff was excepted to on the ground that defendant had no power to undertake said services, and error is assigned to the admission of said testimony.

The defendant sent to plaintiff monthly reconciliation sheets showing the state of the account between it and plaintiff, which was ascertained by charging to plaintiff's account, loans made for plaintiff, checks, drafts and other items, and by crediting deposits and $2\frac{1}{2}$ per cent. on the daily balance. The plaintiff returned to defendant reconciliation sheets acknowledging the correctness of the account upon receipt of each account current, three of these acknowledgments being sent subsequent to April 15, 1912.

It appeared further that the deputy and acting comptroller of the currency had on March 4, 1911, sent the defendant's board of directors a letter (Exhibit 35, R. 170), in which he criticized the condition of the defendant's assets. Itemized loans of \$582,066.05 to the Ford & Johnston Company, together with other loans in the bank amounting to \$51,055, in all, \$633,121.05, depending upon Ford & Johnston for payment, were criticized as in excess of the legal limit and also as hazardous in the opinion of the examiner. Itemized loans aggregating \$79,083.26 were "regarded as extremely doubtful and must be charged off at the time of the next examination if still in the bank." Itemized loans of \$113,264.37 were regarded as "very undesirable and should be collected

as soon as possible." The directors were told that itemized loans of \$254,802.44 "are slow and should have the closest attention with a view to their early elimination." Special attention was called to a credit of \$190,982.93 extended to a series of banks in Birmingham, Ala. The Comptroller said that "this is regarded as a particularly hazardous indebtedness, and it remains practically unchanged since the last examination. In the opinion of the examiner a heavy loss will be sustained on it." Other extended loans of approximately \$230,000 were criticized, and the Comptroller stated that there was an estimated loss of \$38,000 on items in the schedule of bonds, securities, etc.

The letter concludes as follows:

"In view of the foregoing, the condition of your bank must be regarded as very unsatisfactory. The estimated losses, the questionable assets, and other assets which for one reason or another are subject to criticism, aggregate nearly \$2,000,000.00. Many of the objectionable loans are of long standing and appear to be in worse condition than ever before, and on the whole very little progress has been made in remedying conditions criticized by the examiners and this office.

"Immediate and effective measures must be taken to restore the bank to a safe and satisfactory basis. The Ford & Johnson Company indebtedness, which is a serious menace, adequately protected, and the long lists of other slow, extended and questionable loans, hereinbefore set forth, must be given immediate attention, with a view to carrying out the requirements of this letter.

"The directors should realize the seriousness of the situation, and give their best efforts to the work of correcting existing conditions. Marked improvements must be shown at an early date, and this

can be brought about only by the united efforts of the directors and officers.

"A prompt reply to this letter is requested, signed by all of the directors, stating that the requirements of this letter will be complied with, and what they propose to do to effect the necessary improvement in the bank's condition."

Of the assets criticized, \$487,195.89 had been converted into cash on December 9, 1911; \$510,645.89 had been collected on January 6, 1912; \$732,904.13 had been collected on April 15, 1912, and \$835,813.33 had been realized at the time of the trial (Exhibit 49, R. 185-187).

On October 18, 1911, the directors ordered \$52,029.96, the greater part of which was represented by the items ordered charged off in the letter of March 4, 1911, charged to profit and loss (R. 175).

On March 9, 1911, the statement required by Section 5211, R. S. U. S., showing the defendant's condition at the close of business, March 7, 1911, was published in the Cincinnati press.

On May 29, 1911, the defendant's directors ordered \$16,591.17 of the assets criticized charged off. However, the officers of the bank did not actually make said charges to profit and loss until February 16-24, 1912 (Exhibit 46, R. 181, *et seq.*)

Statements were published on June 9, 1911, September 5, 1911, and December 8, 1911, showing the defendant's condition at the close of business some few days before their publication. These statements each showed that the defendant had a capital stock of \$1,000,000 and a surplus fund of \$1,000,000. All the statements showed an item of undivided profits, varying from \$211,268.64 to \$106,874.31. The published statements were a correct copy of defendant's books,

and unless the items criticized by the Comptroller and ordered charged to profit and loss by the directors had in fact been so charged, said assets were included as assets in the published statements. Error is assigned to the admission of this testimony.

Item X appearing on the back of the reports sent by defendant to the Comptroller of the Currency pursuant to law shows the total loans made by the defendant for its country correspondents and charged to their accounts, and an item for discounts secured by mortgage on real estate. The five reports made to the Comptroller of the Currency during the period with which we are concerned in the case at bar showed that the defendant had made \$2,404,698.62 of these loans during this period. The defendant ascertained the amounts of such loans from a book regularly kept for that purpose. Error is assigned to the admission of this testimony proving the Comptroller's knowledge of these unlawful practices (R. p. 79).

On April 14, 1912, defendants directors and officers resigned (R. p. 84) and the Clearing House of the city of Cincinnati guaranteed all of defendant's depositors, the directors in said Clearing House being elected directors by defendant.

On April 15, 1912, the Comptroller of the Currency sent the defendant a notice of impairment of its capital stock in the sum of \$1,000,000 (R. pp. 71, 72), and on this day the Doyle and Galbreath notes, together with the collateral securing the same, were delivered to plaintiff.

On July 6, 1912 (R. p. 85), defendant's stockholders decided to assess themselves \$1,000,000 to make good the deficiency.

On August 22, 1912, the rights of those stockholders who had not paid the assessment were sold at public sale at a premium averaging \$9 a share (R. p. 90) pursuant to advertisement (R. p. 86), the stock securing the loans of plaintiff being sold at a premium of \$167.88.

This sum is now held by the defendant in trust for the person properly claiming to be the owner of the stock certificate and is the only sum which the defendant ever received from making the loans complained of to Galbreath (R. p. 88).

Subsequently plaintiff closed its account with the defendant, receiving all moneys excepting the sums loaned to Galbreath and Doyle, for the recovery of which the suit was brought in the case at bar.

At the close of plaintiff's testimony and again at the close of all the testimony the defendant requested the court to instruct the jury to return a verdict for the defendant. This motion was overruled, exception thereto being reserved. Error is assigned to these rulings of the trial court. Thereupon the defendant, pursuant to the provisions of Section 11447, Ohio General Code, paragraph 5, requested the court to give the following charge:

"No. 2. If you find from the evidence that the plaintiff knew that E. E. Galbreath was the president of the defendant bank, and that the loans in question or either of them were for the benefit and personal interest of the said E. E. Galbreath, I charge you that the defendant can not be held liable for any fraud of the said E. E. Galbreath in the making of any loan to himself in which he was personally interested to the knowledge of the plaintiff." (R. 140.)

The court refused so to charge the jury, and exception to the court's refusal was reserved by the defendant. Thereupon the court charged the jury that the testimony showed that the defendant had charged \$2,500 to plaintiff's account in exchange for a demand note of that amount to Galbreath, secured by eleven shares of the capital stock of the Second National Bank belonging to Galbreath, and that on January 5th another charge of like amount was made in exchange for a demand note of like amount to I. Doyle, who was admitted to be an employe of the Second National Bank, with no real interest in the transaction; said Doyle note being secured by twelve shares of the capital stock of the defendant. Regardless of whether or not plaintiff had proven a contract between the plaintiff and defendant, the testimony showed that the defendant had become plaintiff's agent and, as such, the law imposed a duty upon it of exercising such care with respect to receiving adequate collateral as in view of the nature of the business would be exercised by ordinarily prudent persons in the banking business acting for others without pay and as a mere accommodation, and the further duty of communicating to its principal (the plaintiff) all knowledge that the defendant might have affecting the sufficiency of the collateral security. The plaintiff claimed that defendant had withheld its knowledge of the worthlessness of the capital stock securing the Galbreath and Doyle notes, and to return a verdict for plaintiff if the testimony sustained these charges or if defendant had violated any of the obligations imposed upon it by law.

Error is assigned to this portion of the charge.

That the plaintiff further claimed that the defendant had fraudulently misrepresented the value of its stock to plaintiff with the intention of inducing plaintiff to

make the loans to Galbreath and Doyle complained of; that the statements published in the Cincinnati newspapers constituted the evidence of fraudulent misrepresentations; and that if the jury should find by

“a preponderance of the evidence that these statements, or other statements which were communicated directly to the Okeana Bank, if there were such statements so communicated, were read by the Okeana Bank acting through its officers, and that the Okeana Bank did rely thereon, and was justified under the circumstances in so relying, the Second National Bank would be responsible for loss directly resulting to the Okeana Bank by reliance upon such statements or communications, if such statements or communications were in fact false at the time they were made and were known by the Second National Bank to be false, and were intended to be acted upon.

“As to the question of whether or not such statements, or any of them, were intended by the the Second National Bank to be acted upon, that among others is an element of proof incumbent upon plaintiff to be considered by you, and in its consideration you will take into account all of the facts appearing in evidence as to how and in what form the representations were made, the truth or falsity thereof, and the knowledge or want of knowledge of the Second National Bank, through its officers or agents, of the falsity of the representations, if, in fact, false when made, and in connection with these elements all other matters and circumstances disclosed in evidence” (R. p. 148).

And further that

“If the financial condition of the Second National Bank at the time the two loans were made was such as to make the true value of its stock materially less than that represented, and if the bank, through its officers, knew of such condition, and nevertheless

represented the stock to be of a value materially in excess of its true value, then in such state of facts, if you should so find them, the market value of the stock or the prices paid for the stock by officers of the Second National Bank is of no weight whatsoever.

"Moreover, if you should find that false statements of the bank's financial condition and of the value of its stock were made by the bank through its officers and agents, and that such statements were made by the officers and agents of the Second National Bank in its behalf as statements of fact which they did not know to be fact, or if such statements were in fact false and made recklessly and without regard to whether they were in fact false or true, then such false statements will be of the same effect so far as the responsibility of the bank is concerned as if made with knowledge of their falsity." (R. pp. 149, 150.)

The court properly placed the burden of proof upon the plaintiff, and charged that:

"If upon the evidence you should find that the shares of capital stock of the Second National Bank were, at the time of the Galbreath and Doyle loans, worth substantially what they were represented to be by the financial statements issued by the Second National Bank, or if you find that the shares of the Second National Bank stock were not worth what they were represented, but that the Second National Bank, acting through its officers and agents, did not know that the Second National Bank stock was worth less than represented, or if you should find that the plaintiff bank did not rely upon such representations as were made, then in either such case your verdict will be for the defendant." (R. 150.)

And that

“if upon the evidence and under the law as stated to you, you should find for the plaintiff, you will then determine the amount of its damage. Plaintiff is entitled to recover, if entitled to an award at your hands, of a sum found by taking the difference between the amount of each loan when the same was made and the true value of the collateral (the bank stock attached to the note) at such time.” (R. p. 151.)

And further:

“I have spoken of the element of proof that the plaintiff relied upon such statements as you may find to have been made. In this connection it must appear not only that the Okeana Bank relied on the sufficiency of the collateral, but that under all the circumstances it was justified in so doing. On this score, therefore, you will consider whether a banker of ordinary intelligence and prudence, situated as was the Okeana Bank, and standing in its relation to the Second National Bank, as that relation appears from the evidence, would have relied upon the representations made.

“I have already indicated the elements of burden of proof incumbent upon the plaintiff to establish in order to recover in this action.” (R. pp. 150, 151).

Error is assigned to these portions of the charge.

The defendant reserved the following exception at the close of the charge:

“We want a general exception and in addition thereto an exception because none of the matters mentioned in our special charges were covered or touched upon by the general charge of the court, and further, that by the general charge of the court

we are deprived of a title right and privilege or immunity under the laws and statutes of the United States." (R. p. 152.)

On April 1st the jury returned the verdict heretofore referred to, and on the following day the defendant filed a motion for a new trial and motion for judgment *non obstante veredicto*, assigning as reasons why said motions should be granted, that the defendant had been deprived of the rights, titles, privileges or immunities under the federal statutes hereinafter set out. These motions were overruled and judgment granted on the verdict on May 1, 1915, exceptions being duly reserved by defendant.

In the petition in error filed in the Court of Appeals for the first Appellate District of Ohio, on July 15, 1915, defendant again claimed all of said federal immunities. On March 6, 1916, the judgment of the Superior Court was affirmed by the Court of Appeals. Errors are assigned to this judgment of affirmance. On March 4, 1916, said Court of Appeals made a certificate, that said federal immunities had been properly claimed under the state practice, and that the decision was adverse to the claimed federal immunities.

On March 8, 1916, the Supreme Court of Ohio overruled the defendant's motion for an order directing said Court of Appeals to certify its record to said Supreme Court of Ohio (R. p. 197), and thereafter the cause was remanded to said Superior Court for execution. On April 26, 1916, a writ of error from this court to said Superior Court was allowed, and on April 27th service of the citation, dated April 26th and returnable within thirty days from date, was accepted by plaintiff, the record being filed in this court on May 24, 1916.

Specification of Errors Relied On and Intended to be Urged.

A.

(1) The agreement whereby the defendant undertook to make loans as plaintiff's agent, whether there was a consideration for said agreement or not, and the defendant's actions as agent for plaintiff was *ultra vires*, and the law therefore imposes no duty upon defendant as plaintiff's agent. Therefore the court below erred in overruling defendant's motions for an instructed verdict.

(2) For the same reason, the court erred in charging the jury that

"it is established by the evidence in the case that, at the time the Galbreath and Doyles notes were made and the money of the Okeana Bank paid therefor, the Okeana Bank had requested the Second National Bank to make call loans for it, and the Second National Bank had undertaken so to do. By reason of the Second National Bank undertaking to make such loans at the request of the Okeana National Bank, there arose between the parties the relation of principal and agent, that is to say, a relation wherein the Second National Bank was undertaking to perform the business of the Okeana Bank in making loans. One of the elements arising from this relation is the obligation upon the agent, here the Second National Bank, to perform the business of the agency, in this case the making of call loans upon collateral, with such care and such good faith as the relationship demanded, and if, upon the evidence in this case, you find that the relationship arose from the contract between the banks made for a consideration moving from the Okeana Bank

to the Second National Bank, such finding of fact will be an element for your consideration in determining the duty of the Second National Bank in the premises.

"In the case thus supposed, that of a contract between the parties, the Second National Bank would owe to the Okeana Bank the duty to exercise ordinary care, having in view the nature of the business, to inquire into and ascertain the adequacy of the collateral presented upon such call loans. Again in the case supposed (still assuming that you should find a contract which, however, it is entirely for you to determine upon the evidence), it was the duty of the Second National Bank assuming to act as agent to communicate to its principal, the Okeana National Bank, any matter connected with the making of the loan and the adequacy of the collateral materially affecting the loan and its security.

"If the Second National Bank, assuming to loan the moneys of the Okeana National Bank upon the latter's request, did so merely as an accommodation and convenience to the Okeana Bank, and without consideration moving to the Second National Bank, the Second National Bank would nevertheless be under the duty of exercising such care with respect to receiving adequate collateral as in view of the nature of the business would be exercised by ordinarily prudent persons in the banking business, acting for others without pay and as a mere accommodation. And, under the state of facts last assumed, that is, in the absence of a contract, the Second National Bank acting, if it did so, gratuitously, and for the convenience of the Okeana Bank, would likewise be under the duty of communicating to its principal, the Okeana Bank, knowledge which it might have in respects materially affecting the business of the loan and materially affecting the sufficiency of the collateral security. (R. 145, 156.)

"At this point I may say to you that it is not in all cases necessary that a representation of value be express. Where a confidential relation exists between parties, one of whom is acting for or in behalf of another, there may be and in certain cases there does arise a duty on the part of the former to disclose or communicate to the latter material facts which the former is in good faith bound to disclose. Whether in the present case the relation of the Second National Bank to the Okeana Bank was of such confidential character with respect to the lending of the latter's funds, and if so, whether the knowledge of the Second National Bank, if knowledge it had of the true value of its stock at the time of making these loans, was such as to require of the Second National Bank the disclosure of such knowledge, are questions of fact for the determination of the jury in the light of all the evidence. As I have said to you, the burden is upon the plaintiff to establish that at the time of the making of the Galbreath loan or the Doyle loan, or either of them, the value of the Second National Bank stock was materially less than represented by the Second National Bank, and that at such time the Second National Bank knew that the stock had a value substantially less." (R. pp. 148, 149.)

For the same reason the judgment of affirmance was erroneous.

(3) The testimony that the defendant had acted as agent for other banks for ten years previous to the time of the trial, and that it was so acting at the time of the trial; that it was customary for some other national banks to act as agents in making call loans for their country correspondents; that the defendant kept a special book in which it entered the loans it made as agent of country correspondents; and that the total of said loans was reported to the Comptroller of the Currency was

grossly incompetent. The only question being the defendant's obligation imposed by law for the making of said loans, its construction of the National Bank Act, and the construction of the National Bank Act placed thereon by other bankers does not in any way affect the legality of the action. The only effect of said testimony being prejudicial to the legal claim now urged *bona fide* on behalf of defendant.

For the same reason the judgment of affirmance was erroneous.

B.

(1) The court erred in overruling defendant's motions for an instructed verdict. The testimony showed that the defendant's officers and agents had committed a violation of the National Bank Act in effect wilful and said act gives the exclusive remedy in damages against the officers and agents. The remedy against the bank is a forfeiture of its charter. And the remedy provided by the statute is the sole mode of enforcing the right given by the statute.

The judgment of affirmance was erroneous for the same reason.

(2) The court erred in charging the jury as follows:

"Moreover, if you should find that false statements of the bank's financial condition and of the value of its stock were made by the bank through its officers and agents, and that such statements were made by the officers and agents of the Second National Bank in its behalf as statements of fact which they did not know to be fact, or if such statements were in fact false and made recklessly and

without regard to whether they were in fact false or true, then such false statements will be of the same effect so far as the responsibility of the bank is concerned as if made with knowledge of their falsity." (R. pp. 149, 150.)

Said portion of the charge imposes upon the bank a different criterion for liability than the criterion imposed by law, inasmuch as the only statements in evidence proved to have been issued and seen by plaintiff were those required by Section 5211, R. S. U. S.

(3) The court erred in admitting testimony which proved that the defendant had caused four statements of its condition, which showed that it had a capital stock of \$1,000,000, a surplus of 000,000, and undivided profits varying from \$211,26 \$106,874.31, to be published in the Cincinnati withstanding the warning from the Comptroller currency that the estimated losses, the que assets and other assets which, for one reason another are subject to criticism, aggregate nearly \$1,000,000, and that many of the objectionable loans were of long standing and appeared to be in worse condition than ever before, and on the whole very little progress had been made in remedying conditions repeatedly criticized by the examiners and this office, for the reason that such testimony proved that defendant's officers and agents had committed a violation of the National Bank Act in effect wilful, and that the National Bank Act exempts the national bank whose officers and agents had committed such violation of said act from liability for damages.

The judgment of affirmance was erroneous for the same reason.

C.

(1) The court erred in charging the jury as follows:

"The burden of proof, therefore, is upon the plaintiff, the Okeana National Bank, to establish that the defendant bank, the Second National Bank, represented its stock was worth more than \$200 per share; that such representation was made by the Second National Bank to the Okeana National Bank with the intention on the part of the Second National Bank that the Okeana National Bank should rely thereon; that the plaintiff, the Okeana National Bank, did rely on such representations;" * * *

"Such reports so published in the newspapers are made in pursuance of the law governing national banks, but their purpose is also that of conveying information to those persons who contemplate dealing with the bank in which its financial condition enters as an essential. If you should find, by a preponderance of the evidence, that these statements, or other statements which were communicated directly to the Okeana Bank, if there were such statements so communicated, were read by the Okeana Bank acting through its officers, and that the Okeana Bank did rely thereon, and was justified under the circumstances in so relying, the Second National Bank would be responsible for loss directly resulting to the Okeana Bank by reliance upon such statements or communications, if such statements or communications were in fact false at the time they were made and were known by the Second National Bank to be false, and were intended to be acted upon." * * * "As to the question of whether or not such statements, or any of them, were intended by the Second National Bank to be acted upon, that among others is an element of proof incumbent upon plaintiff to be considered

by you, and in its consideration you will take into account all of the facts appearing in evidence as to how and in what form the representations were made, the truth or falsity thereof, and the knowledge or want of knowledge of the Second National Bank, through its officers or agents, of the falsity of the representations, if, in fact, false when made, and in connection with these elements all other matters and circumstances disclosed in evidence."

* * * "I have spoken of the element of proof that the plaintiff relied upon such statements as you may find to have been made. In this connection it must appear not only that the Okeana Bank relied on the sufficiency of the collateral, but that under all the circumstances it was justified in so doing. On this score, therefore, you will consider whether a banker of ordinary intelligence and prudence, situated as was the Okeana Bank, and standing in its relation to the Second National Bank, as that relation appears from the evidence, would have relied upon the representations made." (R. 217, 218.)

for the reason that the association which publishes statements required by Section 5211, R. S. U. S., can not as a matter of law intend to induce anyone to lend money to its stockholders secured by its capital stock belonging to the stockholders borrowing the money.

The judgment of affirmance was erroneous for the same reason.

(2) The court erred in admitting testimony which showed that the bank caused four statements to be issued in which it represented its capital stock at \$1,000,000, its surplus at \$1,000,000, and its undivided profits as varying from \$211,268.64 to \$106,874.31, notwithstanding the fact that its directors had been cautioned and warned by the Deputy and Acting Comptroller of the Currency that its estimated losses, questionable and criticizable

assets aggregate nearly \$2,000,000, for the reason that the intent to cause persons to lend money on the security of the capital stock of the institution publishing the statements can not as a matter of law be imputed to the institution publishing said statements.

The judgment of affirmance was erroneous for the same reason.

D.

The court erred in refusing and declining to charge the jury as follows:

"No. 2. If you find from the evidence that the plaintiff knew that E. E. Galbreath was the president of the defendant bank, and that the loans in question or either of them were for the benefit and personal interest of the said E. E. Galbreath, I charge you that the defendant can not be held liable for any fraud of the said E. E. Galbreath in the making of any loan to himself in which he was personally interested to the knowledge of the plaintiff." (R. 140.)

for the reason that the plaintiff when it dealt with the defendant's president knowing him to have a personal interest in a transaction in which the bank which he represented was interested, transacted said dealing at its peril.

ARGUMENT.

A.

The Arrangement Whereby the Defendant Undertook to Act as Agent for the Okeana Bank in the Making of Loans was Ultra Vires, and the Law Imposed No Duty Upon Defendant for its Actions as Such Assumed Agent.

The powers of a national bank are given to it by paragraph seven of Section 5136, R. S. U. S., quoted in full on page 28 of our brief on the motion to dismiss or affirm and in the appendix hereto. This statute has always been strictly construed, and powers not expressly granted therein may not lawfully be exercised by national banks. *Logan County Bank v. Townsend*, 139 U. S. 67. The section does not give the bank the authority to transact such business as that of lending money of its depositors or of other people in general. Therefore, such authority is wanting. *Grow v. Cockrill*, 63 Ark. 416, 36 L. R. A. Further, "It is not within the scope of the business of bankers to seek or make investments generally for their customers." *Bishop v. Countess of Jersey*, 3 Drew, 143, 163.

It is also evident from other provisions of the National Bank Act that Congress did not intend banks in reserve cities to assume an agency in lending their country correspondents' funds. Sections 5134 and 5190, R. S. U. S. (quoted in the appendix hereto) show that Congress intended national banks to do business in one specified town and there only, excepting that a state bank, under the circumstances specified, (section 5155 quoted in the appendix) acquiring a charter as a national bank may continue its branches. The way in which a national

bank may change the place where its operations of discount and deposit are carried on is provided by Section 2 of the Act of May 1, 1886, Chapter 73, 24 Statutes at Large 18 (quoted in the appendix hereto). There is no pretense that plaintiff complied with any of these requirements.

The result of the defendant's assumed actions therefore in the case at bar was that the plaintiff's capital was *pro tanto* diverted from Okeana and shipped to Cincinnati by defendant's active co-operation. The evil resulting therefrom being that a large part of plaintiff's banking capital was concentrated in Cincinnati. Such accumulation of capital was in disregard of the policy of the National Banking Law as seen in its numerous provisions regulating the amount of the capital stock, the methods to be pursued in increasing or reducing its capital stock and the restrictions imposed on changing its location. The further evil (shown by the testimony) was that the plaintiff's board of directors loaned money to perfect strangers with whose financial responsibility, banking requirements, etc., they were unfamiliar, relying only on the adequacy of the collateral (R. 35). (In effect the plaintiff made a temporary investment in the stock of the defendant, for the defendant's stock was the security on which the investment was made.) Not only was the plaintiff ignorant of the borrower's means, needs, etc., but the defendant's directors also had no cognizance of these matters for they did not know that the loans had been made (R. 89), so that a series of loans were made which never were effectively considered by the board of directors of either institution.

"One of the evident purposes of this enactment (the National Bank Act) is to confine the management of each bank to persons who live in the neighborhood and who

may for that reason be supposed to know of the trustworthiness of those who are to be appointed officers of the bank, and the character and financial ability of those who seek to borrow its money." *Concord National Bank v. Hawkins*, 174 U. S. 364, 367. But if the funds of the bank in Okeana instead of being retained in the custody and management of its directors are loaned to persons unknown to its directors, the policy of this wholesome provision of this statute is frustrated, and a part of the banking capital whose minimum for Okeana is limited by Section 5138 as a condition precedent to the granting of plaintiff's charter as a national bank is removed from the place in which it was placed by the secretary of the treasury in a way not provided for by the National Bank Act.

Moreover, imposing the duty of disclosure on the defendant would make it impossible for any national bank lending money for its customers or country correspondents accurately to comply with Section 5211, R. S. U. S. For whether or not there was a liability for each loan would in each case depend upon the verdict of a jury. The Comptroller of the Currency's letter did not in any way diminish the value of this defendant's capital stock in Mr. Gutting's (R. 91, 94, 108), or in Mr. Galbreath's eyes (R. 91). Both of them paid \$242.50 a share as a purchase for themselves after the letter was received, so that there was no actual bad faith in failing to disclose the contents of the Kane letter to the plaintiff. No one can hazard a guess concerning the extent of defendant's liabilities on the other loans defendant made for its correspondents during the period covered by the record in the case at bar. Nor were such loans treated by the Comptroller as liabilities. Reports were required just as reports concerning loans secured by mortgage on real

estate were demanded, although the loans for correspondents do not appear as liabilities.

As a matter of proper analysis it seems necessary to determine whether plaintiff's cause of action sounded in contracts or in torts. It is respectfully submitted that it was in its essence a contractual obligation. Disregarding the fact that the petition clearly states an action for money had and received and that the court below by overruling our demurrer to the reply indicated its opinion that the reply was not a departure from said action, in Ohio "Agency is founded upon a contract either express or implied by which one of the parties confides to the other the management of some business to be transacted in his name, or on his account, by which the other assumes to do the business, and to render an account for it." *Ish v. Crane*, 13 O. S. 574. See, also, 2 Kent. Commentaries, 781.

"The true rule undoubtedly is, that as the contract of agency is one for the benefit of both parties, the agent is understood to contract for reasonable skill and ordinary diligence, and he is consequently liable for injuries to his employer occasioned by the want of reasonable skill and also for ordinary diligence." Story on Agency, Sec. 183.

The defendant's alleged duty of disclosing to plaintiff all it knew concerning the collateral offered to secure the loans was not a duty *in rem*. It was part and parcel of its other duties as agent (obedience, skill and the like), owed, not because it was a national bank, or because its president wanted to borrow money, but because of a consensual arrangement whereby it undertook to perform certain acts for plaintiff. The duty to disclose was one of the terms of the contract of agency

which the law imposed because of the fiduciary relationship created by the contract of agency. Unless it had fulfilled this duty it had not complied with the contractual obligation to account to plaintiff. It was, therefore contractual (the confusion, if any, in the books as to the nature of this right is fully explained by Dean Ames's History of Assumpsit, 2 Harvard Law Review, 1 and 53) and the ordinary rule, that *ultra vires* contracts are void, must apply; the alleged duty of disclosure being one of the terms of an *ultra vires* contract, it must fall with the contract.

This rule and the reasons therefore have never been better expressed than by Mr. Justice Gray in *McCormack v. Bank*, 165 U. S. 538, 549 to 550. In that case Mr. Justice Gray says that *ultra vires* corporate contracts are void because of

"The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law." *McCormack v. Bank*, 165 U. S. 538, 549, 550.

Each of these three reasons is especially applicable to the case at bar.

Plaintiff and defendant are both national banks, and both in fact must know the exact limit of their powers as granted by the National Bank Act.

Defendant's stockholders, who have already paid an assessment of \$1,000,000, are more interested in having the risks of the capital invested prior to the assessment strictly limited to the risks undertaken at the time of the investment, than stockholders of a corporation

which has never been through the throes of a reorganization.

It is more to the interest of the public that national banks shall not transcend the powers conferred on them by law because of the governmental function performed by national banks in the issuance of money, than it is to the public interest that other corporations shall not transcend their legal powers.

In *Merchants National Bank v. Wehrmann*, 202 U. S. 295, this court held that since it was *ultra vires* a national bank to enter into a partnership it could not be made liable for its acts as partner and for its share of the expenses of purchasing, managing, handling, holding, improving and disposing of the partnership property.

This court held that:

"If the membership failed the incidental rights failed with it, and with the rights the liabilities also disappeared. Becoming a member of the firm was the condition of both consequences. As the bank was not estopped by its dealings to deny that it was a partner, it was not estopped to deny all liability for partnership debts." *Merchants National Bank v. Wehrmann*, 202 U. S. 295.

That part of the decision of the Supreme Court of Ohio, 69 O. S. 161, 174, which was affirmed by this court, held that "If it had the power to become a partner, such might be the case (the bank might be liable in full for partnership debts); but not having the power, it can not go beyond its powers, and can not by any act make itself a partner, and can not incur a partnership liability." By a perfect parity of reasoning a national bank not having the power to become an agent, can not go beyond its powers and can not by any act make itself an agent and can not incur an agent's liability. For partnership

rights and liabilities are contractual and arise out of the agency of one or more partners as representatives of the others. And as the bank was not estopped to deny its agency it was not estopped to deny all liabilities for its acts as agent.

This was the holding of the Supreme Court of Arkansas in *Grow v. Cockrill*, 63 Ark. 418, 36 L. R. A. 89. In that case the court says:

"There is no showing that the bank, by its charter, had authority to transact such business as that of loaning the money of its depositors or other people in general. Such authority we have failed to find in the National Banking Law, and the decisions on the subject, or rather the decisions involving analogous facts, all seem to be to the effect that the business of a broker (and a broker's business is to loan the money of others, or borrow for others, and such like), is not a business in which a national bank can lawfully engage, since it is not mentioned in the National Bank Act and the act is strictly construed as against the grantee corporation, as to the powers conferred as in all cases of private corporate grants of power. In the case, *Weckler v. First National Bank of Hagerstown*, 42 Md. 581, a suit was brought against the bank for damages growing out of the purchase of certain bonds which the teller of the bank had sold him, and falsely represented to be what they really were not, to the injury of the plaintiff, the complaint averring that the bank was engaged in buying and selling these bonds, and was therefore liable for damages occasioned by the false representation, in relation thereto of the teller, one of the agents in the transaction of its business. The plaintiff was defeated in his suit, the court holding that the bank had no authority to transact that kind of business, and the teller was therefore not acting within the scope of his authority and business when

he committed the torts complained of. To the same effect is the rule in the case of *First National Bank v. Hoch*, 89 Pa. St. 324, and that in the case of *Dresser v. Traders National Bank*, 42 N. E. 567."

It must be evident that a suit for damages for a breach of the alleged duty of disclosure affirms the *ultra vires* contract between the parties, for damages are sought for breach of a duty which would not have existed but for the *ultra vires* contract of agency entered into between plaintiff and defendant.

Defendant's alleged obligation of disclosing to plaintiff may be considered either, as one of the terms imposed upon the defendant by reason of its assumed contract of agency, or, because of the alleged fiduciary relationship existing between plaintiff and defendant, the defendant's offer of the collateral to the loans complained of may be regarded as including an implied representation that the defendant knew of nothing which made the collateral undesirable. In its charge to the jury the court below instructed the jury that this was the nature of defendant's obligation to plaintiff in the case at bar (R. 148). This charge was erroneous whether plaintiff's remedy sounds in contracts or in torts. Conducting the agency being *ultra vires* the defendant to plaintiff's knowledge, the implied representation made by defendant's cashier that so far as he knew there was nothing the matter with the collateral was a representation which to plaintiff's knowledge defendant's cashier could not make within the scope and course of his employment as defendant's agent. In *Weckler v. First National Bank*, 42 Md. 581, the court held:

"In an action of deceit against a national bank to recover damages for the alleged false representations of its teller in the sale to the plaintiff of certain

railroad bonds, *held*, that the selling of railroad bonds on commission was not within the authorized business of a national bank; and being thus beyond the scope of its corporate powers the defense of *ultra vires* was open to it, and it was not responsible for any false representations which its teller might have made to the plaintiff and by which she was induced to purchase the bonds." *Weekler v Hagerstown First National Bank*, 42 Md. 581, Syl. 5 and 6.

We submit that the fact that the representations of value was implied in the case at bar and not express does not distinguish the case at bar from the Weekler case.

That the testimony complained of in the specifications of errors A. 2, *supra*, was incompetent seems too plain for extended argument. The only question to be determined was a question of the legal construction of a statute properly enacted by Congress and which could be amended only by Congress. In the absence of any congressional amendment the construction placed thereon by laymen subsequent to the enactment of the statute by Congress certainly in no way tends to prove the intention of Congress at the time of the enactment of the statute.

B.

A National Bank Can Not be Made to Respond in Damages When its Officers and Directors Commit a Violation of the National Bank Act, Which is in Effect Wilful.

Our statement of the case includes such a large part of the court below's charge to the jury because it has been claimed that this contention is irrelevant to the case at bar. We agree that a hypothetical case may at some future time be tried to which this question may be immaterial. But the issue concerning the defendant's liability for the publication of these statements was brought into the case by plaintiff in its amended reply,

testimony sustaining the issue was offered by plaintiff and admitted notwithstanding our objections and exceptions, and the cause was submitted to the jury by the court below on the alternate theory of an implied misrepresentation as to the value of the stock arising out of the fiduciary relationship existing between the parties, or of an express misrepresentation supported by the evidence of the allegedly false statements published in the Cincinnati press. Since this court will not concern itself with supposititious cases we proceed to state our contention and to limit it, because we fear counsel and the courts below have misunderstood it. We do not contend that a national bank can not be made to respond in damages for any fraudulent misrepresentations. We do contend that the statements required by Section 5211, R. S. U. S., can not be made the basis of an action in deceit against a national bank, and that when the officers and agents of the bank publishing said statements have, in the publication of the statements, committed a violation of the National Bank Act which was in effect wilful, that the National Bank Act exempts the bank on whose behalf its officers and agents caused the statements to be published from liability in damages.

In *Thomas v. Taylor*, 224 U. S. 673, this court held that the officers and agents who caused the national bank which they represented to publish statements notwithstanding the receipt of a letter similar to the letter (Exhibit 35) received by the defendant from the Comptroller of the Currency in the case at bar were guilty of a violation of the National Bank Act which was in effect wilful. In *Yates v. The Jones National Bank*, 240 U. S. 541, this court held that when the officers and agents of the national bank caused said statements to be published knowing them to be false in fact, that this constituted

a wilful violation of the National Bank Act. If therefore this contention (that the National Bank Act exempts the association on whose behalf the statements are published from liability in damages) is sound, it is immaterial whether or not the statements were in fact false and published by the officers and agents of the defendant with knowledge of that fact and constituted thus a wilful violation of the National Bank Act, or whether the publication constituted a violation of the National Bank Act in effect wilful because of the disregard of the terms of the Comptroller of the Currency's letter. In either event publication of the statements on behalf of defendant by its officers and agents constituted sufficient violation of the act to impose liability for damages on defendant's directors, under Section 5239, R. S. U. S., and to exempt defendant from such liability under said section.

That section provides that in cases of wilful (or in effect wilful), violations of any of the provisions of the National Bank Act, that all the rights, privileges and franchises of the association shall be forfeited and that every director who participated in, or assented to, the same shall be held liable in his personal and individual capacity for all damages to the association, its shareholders or any other persons who have suffered in consequence of such violation, but that before the association shall be declared dissolved there must be a determination of the violation by some United States Court. Neither expressly nor by implication does the section provide that there must be a dissolution of the association before personal liability attaches to the directors. In both the Thomas and Yates cases there had been no dissolution of the association, so that a judgment of ouster is not a condition precedent to the directors liability. Moreover, the

remedies provided by Section 5239, R. S. U. S., are mutually exclusive.

The reports were required by Section 5211. That section of the National Bank Act gives the public the right to know of the condition of national banks. This court has frequently held that where a right is created by the National Bank Act and a remedy given for violations of such right that the remedy given is exclusive. *Scott v. Dewees*, 181 U. S. 282; *Barnet v. National Bank*, 98 U. S. 558; *Oates v. Bank*, 100 U. S. 239; *Stephens v. Bank*, 111 U. S. 197; *Hasseltine v. Bank*, 183 U. S. 134. In *Yates v. Jones National Bank*, 206 U. S. 158, this court held that:

"When a statute creates a duty and prescribes a penalty for its non-performance the rule prescribed by the statute is the exclusive test of liability.

"The National Banking Act as embodied in Section 5239, *Revised Statutes*, affords the exclusive rule by which to measure the right to recover damages from directors based upon a loss resulting solely from their violation of a duty imposed upon them by a provision of the act, and that liability can not be measured by a higher standard than that imposed by the act." *Syllabi 3 and 4, Yates v. Jones National Bank*, 206 U. S. 158.

The Yates case concerns itself with the liability of directors for statements which this court held to be false in fact (*Yates v. Jones National Bank*, 240 U. S. 541) when the case was brought to the court on a second writ of error. We confidently submit that since the exclusive rule by which to measure the right given by Section 5239, is to be determined by Section 5239; that the existence of the right is further to be determined by that section: That since Section 5239 does not give the right claimed by plaintiff in the case at bar, that the right is non-existent.

But if the right does exist we submit that its measure must be determined by Section 5239 and that statements in fact false but made recklessly and without regard to whether they were in fact false or true can not be made the criterion for liability for the statements required by Section 5211.

It must inevitably follow that since no liability in damages can be imposed upon defendant for the publication of the statements complained of in the case at bar, that the testimony proving their publication was incompetent even though the defendant's acts as agent, were not *ultra vires*. Plaintiff had proven its case if said action was *ultra vires*, as soon as it showed that the contents of the Kane letter had not been communicated to it. The only effect the proof of the publication of the statements could have, would be an aggravation of the wrong complained of and no more competent that proof that B kicked A in the face after knocking him down in an action for battery by A against B because B had knocked A down.

C

The Court Below Erred in Charging the Jury that it was a Question for it to Determine Whether Defendant Had Intended to Induce Plaintiff to Lend Money on the Security of Defendant's Capital Stock by the Publication of the Statements, Because as a Matter of Law Such Intent Can Not be Imputed to Defendant.

The rule that no action of deceit lies unless the representation complained of was intended to influence the action of the person or class of persons injured thereby is so well settled that we do not expect it to be disputed. Unless as a matter of law the defendant could have intended to induce customers or outsiders to lend money to its stockholders on the security of capital stock owned

by its stockholders, its application to the case at bar makes the charge erroneous. We submit that as a matter of law the bank does not publish the statements for the benefit of its stockholders. The statements are published to inform the world concerning the banks solvency, so that its deposits, discounts and other liabilities of that sort may be readily incurred. The publication of the defendant's surplus and undivided profits was intended to guide the world concerning the safety with which people could lend money, accept its bank notes, or make deposits in the bank. The banking functions prescribed in Section 5136 are in no way affected by the market or book value of the stock.

In *Merchants National Bank v. Armstrong*, 65 Fed., 933, suit was brought by the Merchants National Bank of Hillsboro, against the Receiver of the defunct Fidelity National Bank of Cincinnati, Ohio. The petition alleged that the directors had issued the statements required by Section 5211 of the Revised Statutes of the United States; that said statements were all false and fraudulent; that the Fidelity Bank had further issued circulars stating that it was doing a larger business than it had ever done before and that it had the largest capital, surplus and deposit account of any national bank in Ohio when in fact the Fidelity National Bank was insolvent at the date of the issuance of this circular; and that relying upon the truth of the statements the plaintiff loaned money on the security of a hundred shares of the capital stock of the bank. It was held on demurrer, first: That the issuance of the circular letter was beyond the scope and course of the officers and that therefore the Fidelity National Bank was not liable for the false statements contained therein; and second, That the statements required by the National Banking Act

are not published with the intention of obtaining credit on the stock as collateral to loans.

"It is further urged that the publication is not intended alone for those who are stockholders and depositors at the date of the report, because notice of its contents could be brought home to them in a less public manner, and that the making and publishing of the reports must be for the further purpose of informing those who may contemplate dealings with the bank, or may be brought into connection with it, in any way in which the financial condition of the bank would be a consideration of moment. For illustrations, owners of shares of stock, those about to purchase such shares, and third parties having dealings in the stock, entirely independent of and apart from the bank, are referred to. In short, the claim is that the reports were addressed to the general public, and the plaintiff, having acted upon them, was misled to its damage, and entitled to recover. The reports were not made voluntarily, but in compliance with the requirement of the statute. They must be taken to be made only to those within the contemplation and protection of the statute. Experience teaches that the danger of banks, as distinguished from other corporations or agencies for the transaction of business, is not in the fact that their stock may be issued and bought and sold on the market, but in their power to issue notes, receive deposits, and make discounts. The government has always shown a disposition to regulate banks in order to secure the public against the misuse of these functions. The act is entitled, 'An act to provide a national currency.' It is entirely directed to providing for the safety of the note issue and the security of the discounts and deposits. All its collateral provisions, of which there are a number, including the one under discussion, are directed to that end. The conclusion

is irresistible that the statute, in requiring reports such as those in question, contemplates merely the persons who deal directly with the bank as a financial institution; that the report, therefore, is directed to them, and they only can recover. Dealers in the stock of the bank, and holders of it as collateral, are not, under the statute, privy to the reports, and, if deceived or misled by them, they can not recover against the bank. Counsel cite from Cooley, Torts, p. 493, where it is said that 'some representations are made for the express purpose of inducing individuals or the public to act upon them, and whoever in fact does receive, rely, and act upon these, in the manner intended, has a right to regard them as made to him, and treat them as frauds upon him, if in fact he was deceived to his damage.' But, in the view just taken, the bank can not be held to have issued the reports for the purpose of inducing transactions such as that set forth in the petition, and the citation, therefore, does not apply." *Merchants Nat. Bank v. Armstrong*, 65 Fed. 932, 936, 937.

D.

Plaintiff Accepted the Loans and Collateral Complained of at its Peril Because it Knew that Galbreath, Defendant's President, Had a Personal Interest in a Transaction in Which He Represented the Defendant.

The testimony that plaintiff knew that Galbreath was defendant's president at the time it approved the loans which were to be made to Galbreath (R. 40, 46, 47) is undisputed. Pursuant to the provisions of Section 11447, Paragraph 5, Ohio General Code, quoted in the appendix hereto, special charge No. 2 (R. 140) was presented in writing to the court below. The court's duty

to give said special charge to the jury was mandatory, (*Railroad v. Hawkins*, 64 O. S. 391; *Monroeville v. Root*, 54 O. S. 523) if the charge contained a correct statement of the law.

In *Moore v. Bank*, 111 U. S. 156 this court held that:

"An agent can not lawfully act for his principal and for himself in matters in which they have adverse interests, and every person dealing with an agent who is acting for himself as well as for his principal in such matters is put upon inquiry as to the authority and good faith of the agent." *Moore v. Bank*, 111 U. S. 156.

That case affirms the case of *Moore v. Citizens National Bank*, 15 Fed. 141. The lower court charged the jury as follows:

"Agents intrusted with important interests and invested with large powers have many opportunities for an abuse of their trusts. Nevertheless, if their fraudulent acts are within the scope of their agencies, and a loss must result either to their principals or to an innocent person, who relied upon their action in the belief that the same was valid, the law would cast the loss upon the principal who selected and placed the agent in the position to do the wrong, and not the innocent party. But if the complaining party knows, when accepting a check, certificate of stock, receipt, or other acquittance or obligation, issued or executed by the agent in the name of the principal, that he was acting in regard thereto for himself and in his own interest, such knowledge would put such party on inquiry, and divest him or her of the legal rights and incidents pertaining to that class of persons.

"The plaintiff having had knowledge of the fact that Moores, upon whom she relied to have the stock transferred to her, was acting for himself as well as in his capacity of cashier,—that is, acting

for the bank upon one side and for himself on the other, in reference to the matter of issuing this certificate,—she is not, in the judgment of this court, an innocent holder of the stock; and as the certificate was issued without authority and in fraud of the rights of the bank, the court instructs you that the plaintiff is not entitled to recover in this action. Your verdict will therefore be for the defendant.”

Moore v. Citizens Nat. Bank, 15 Fed. 141, 146.

Galbreath, defendant's president, could not borrow money from plaintiff through defendant, without disclosing all matters known to him which affected the collateral if defendant was bound to disclose all facts it knew concerning the collateral offered to secure the loan without violating the duty he owed the defendant; to wit, to disclose to plaintiff everything which defendant was bound to disclose to plaintiff. It was his duty as defendant's president to force defendant's officers and agents, including himself, to observe all duties which the defendant owed to the world at large. And he could not divest himself of this duty by instructing some one of the defendant's other officers to notify the plaintiff of the loan and the collateral securing it. For he was defendant's executive head to whom all of defendant's other officers and agents, were responsible. Moreover, Galbreath's personal interest to get the money for himself conflicted so successfully with his duties as defendant's president that no disclosure was made by defendant; and it was his personal interest in the transaction that prevented the defendant from performing its alleged duties to plaintiff. Whatever fraud or illegality was committed in the case at bar was due to Galbreath. For the other loans made by defendant for plaintiff in which Galbreath was disinterested were all proper. And the loans to Galbreath were improper because Galbreath needed the money so badly

that he disregarded his duties as defendant's president. If Galbreath defrauded plaintiff, he likewise defrauded defendant's stockholders by preventing defendant from performing duties allegedly owed to plaintiff, without even disclosing to defendant's stockholders and directors that he was jeopardizing their rights in a transaction in which he was interested. (R. 89.)

Plaintiff's knowledge that Galbreath had a personal interest in the transaction was a danger signal which plaintiff disregarded at its peril. *Park Hotel v. First National Bank*, 86 Fed. 742, 744.

We submit that the loss should be borne by plaintiff who was charged with knowledge of the fraud practised upon defendant by Galbreath and not by the defendant's innocent stockholders and directors who have paid a million dollars to enable defendant to continue in the performance of its duties as an agent of government and who were in complete ignorance of the alleged fraud.

In conclusion we submit respectfully, that though this may be a hard case on the facts and though a reversal and final judgment for defendant might work an apparent injustice upon plaintiff, that this injustice, apparent only, is due solely to plaintiff's election to sue defendant, instead of defendant's officers and directors, against whom a complete and adequate remedy exists. Even without this remedy, the legal principles involved are so clear, plaintiff's active participation in defendant's unlawful acts, and plaintiff's knowledge of the fraud complained of is so manifest that a reversal and final judgment for defendant is required.

FERDINAND JELKE, JR.,

LONDON L. FORCHHEIMER,

APPENDIX.

SEC. 5134. The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state:

First: The name assumed by such association; which name shall be subject to the approval of the Comptroller of the Currency.

Second: The place where its operations of discount and deposit are to be carried on, designating the State, territory, or district, and the particular county and city, town or village.

Third: The amount of capital stock and the number of shares into which the same is to be divided.

Fourth: The names and places of residence of the shareholders and the number of shares held by each of them.

Fifth: The fact that the certificate is made to enable such persons to avail themselves of the advantages of this Title. (R. S. U. S.)

Sec. 5136. Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

First: To adopt and use a corporate seal.

Second: To have succession for the period of twenty years from its organization, unless it is sooner dissolved according to the provisions of its articles of association,

or by the act of its shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law.

Third: To make contracts.

Fourth: To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.

Fifth: To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Sixth: To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

Seventh: To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debts; by receiving deposits, by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this Title.

But no association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking. (R. S. U. S.)

Sec. 5138. No association shall be organized with a less capital than one hundred thousand dollars, except that banks with a capital of not less than fifty thousand dollars may, with the approval of the Secretary of the Treasury, be organized in any place, the population of which does not exceed six thousand inhabitants, and except that banks with a capital of not less than twenty-five thousand dollars may, with the sanction of the Secretary of the Treasury, be organized in any place the population of which does not exceed three thousand inhabitants. No association shall be organized in a city the population of which exceeds fifty thousand persons with a capital of less than two hundred thousand dollars. (R. S. U. S.)

Sec. 5155. It shall be lawful for any bank or banking association organized under State laws, and having branches, the capital being joint and assigned to and used by the mother-bank and branches in definite proportions, to become a national banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to retain; the amount of the circulation redeemable at the mother-bank, and each branch, to be regulated by the amount of capital assigned to and used by each. (R. S. U. S.)

Sec. 5190. The usual business of each national banking association shall be transacted at an office or banking-house located in the place specified in its organization certificates. (R. S. U. S.)

Sec. 5211. Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be pre-

scribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified; and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him, and in the same form in which it is made to the Comptroller shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition. (R. S. U. S.)

Sec. 5239. If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this Title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity

for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation. (R. S. U. S.)

Sec. Act of May 1, 1886, ch. 73, 24 Stat. L. 18.

That any national banking association may change its name or the place where its operations of discount and deposit are to be carried on, to any other place within the same State, not more than thirty miles distant with the approval of the Comptroller of the Currency, by the vote of shareholders owning two-thirds of the stock of such association. A duly authenticated notice of the vote and of the new name or location selected shall be sent to the office of the Comptroller of the Currency; but no change of name or location shall be valid until the Comptroller shall have issued his certificate of approval of the same.

Sec. 11447. Paragraph 5. Ohio General Code.

5. When the evidence is concluded, either party may present written instructions to the court on matters of law, and request them to be given to the jury, which instructions shall be given or refused by the court before the argument to the jury is commenced.



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JAMES D. MAHER
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No. 491.

Supreme Court of the United States.

October Term, 1916.

File No. 25312.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO,
a banking association organized and existing under the
laws of the United States of America,

Plaintiff in Error,

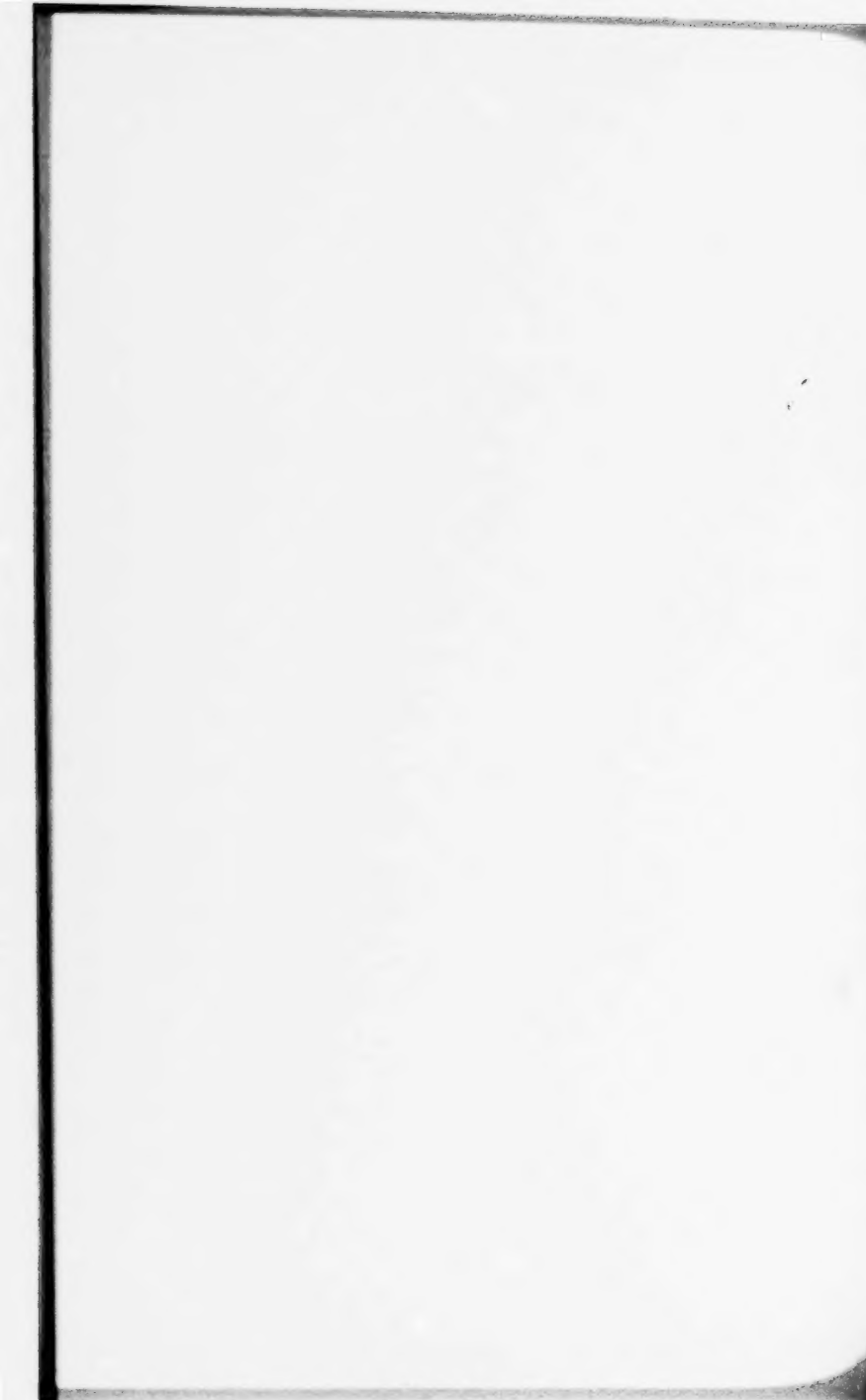
versus

THE FIRST NATIONAL BANK OF OKEANA, OHIO, a bank-
ing association organized and existing under the laws
of the United States of America,

Defendant in Error.

Brief for Defendant in Error.

EDWARD P. MOULINIER,
Attorney for Defendant in Error.



INDEX.

	PAGE.
Statement of case	1
Statement of facts	2
Argument	5
Answer to the claim that "The arrangement whereby the defendant undertook to act as agent for the Okeana Bank in the making of loans was <i>ultra vires</i> and the law imposed no duty upon the defendant for its actions as such assumed agent"	5
Answer to the claim that "A national bank can not be made to respond in damages when its officers and directors commit a violation of the national banking act which is in effect wilful."	17
Answer to the claim that "The court below erred in charging the jury that it was a question for it to determine whether defendant had intended to induce plaintiff to lend money on the security of defendant's capital stock by the publication of the statements, because as a matter of law such intent can not be imputed to defendant"	21
Answer to the claim that "Plaintiff accepted the loans and collateral complained of at its peril because it knew that Galbreath, defendant's president, had a personal interest in a transaction in which he represented the defendant"	24

TABLE OF CASES.

	PAGE.
American National Bank v. National Wall Paper Co., 77 Fed., 85	13
Anderson v. First National Bank of Grand Forks, 5 N. D., 451	11
Bankers Trust Co. v. Texas Pac. Ry. Co., 241 U. S., 295	25
Bobb v. Savings Bank, 23 Ky. L. Rep., 817	12
California Bank v. Kennedy, 167 U. S., 362	8
Central Transp. Co. v. Pullman Co., 139 U. S., 24	13
Cincinnati Volksblatt Co. v. Hoffmeister, 62 O. S., 189	26
Citizens Natl. Bank v. Appleton, 216 U. S., 196	15
Darling v. Younker, 37 O. S., 487	26
Emmerling v. First National Bank, 97 Fed., 739	13
First National Bank v. Hoch, 89 Pa., 324	16
First National Bank v. National Exchange Bank, 92 U. S., 122	8
Grow v. Cockrill, 63 Ark., 418	17
Hindman v. Bank, 112 Fed., 931	23
Isham v. Post, 141 N. Y., 100	26
Jones National Bank v. Yates, 240 U. S., 541	19
Logan County Bank v. Townsend, 139 U. S., 62	14
Louisiana v. Wood, 102 U. S., 294	15
Merchants National Bank v. Armstrong, 65 Fed., 933	20
Michie on Banks and Banking, Vol. 2, page 1628	13
Moore v. Citizens National Bank, 15 Fed., 141; 111 U. S., 156	24

II

National Bank v. Graham, 100 U. S., 699	10
National Bank v. Matthews, 98 U. S., 621	15
National Bank v. Whitney, 103 U. S., 99	15
National Bank of Commerce v. Equitable Trust Co., 227 Fed., 526	14
National Bank of Xenia v. Stewart, 107 U. S., 676	15
Outlines of Agency by Mechem, Sec. 174	10
Scott v. Deweese, 181 U. S., 282	18
Thomas v. Taylor, 224 U. S., 73	19
Thompson v. Bank, 146 U. S., 240	15
U. S. Revised Statutes, Sec. 5192	9
U. S. Revised Statutes, Sec. 5239	17
Weckler v. First National Bank, 42 Md., 581	16
Yates v. Jones National Bank, 206 U. S., 158	19

Supreme Court of the United States.

October Term, 1916.

File No. 25312.

*THE SECOND NATIONAL BANK OF CINCINNATI,
OHIO, a banking association organized and existing
under the laws of the United States of America,
Plaintiff in Error,*

No. 491.

vs.

*THE FIRST NATIONAL BANK OF OKEANA, OHIO,
a banking association organized and existing under
the laws of the United States of America,
Defendant in Error.*

Brief for Defendant in Error.

STATEMENT OF CASE.

The suit was commenced originally in the Superior Court of Cincinnati by the First National Bank of Okeana, Ohio, against the Second National Bank of Cincinnati, Ohio. In that court a verdict was rendered against defendant on March 31, 1915, for \$5,899. Judgment was

given on the verdict. The case was taken on error to the Court of Appeals of Hamilton County by defendant, and the judgment affirmed. Thereupon an application for leave to file a petition in error was made to the Supreme Court of Ohio, which was refused. The present writ of error was taken to the decision of the Court of Appeals, which, under the Ohio law, is a court of final jurisdiction. A motion to dismiss or affirm was filed in this court by the defendant in error, the Okeana Bank, and the hearing on said motion is now before the court for oral argument on the summary docket.

STATEMENT OF FACTS.

Although a statement of facts was given in the brief of plaintiff in error, we feel that our argument on the law will be clearer if we make a very short statement of what we consider to be the salient facts, some of which are not noticed in their brief. We shall call plaintiff in error defendant, and defendant in error plaintiff, giving the parties as they appeared in the trial court. The record discloses the following facts:

Early in January, 1911, defendant became the depository of plaintiff for a portion of the lawful reserve money of plaintiff, with the consent of the Comptroller of the Currency. (Ex. 5, Rec. 155.) The consideration for this transaction was the promise on the part of the defendant to make loans of such money on collateral for plaintiff. (Rec. 40.)

After this contract was made, defendant loaned for plaintiff on collateral various sums of money, amounting at times to twenty-five thousand dollars. (Ex. 33, Rec. 169.) The testimony showed that during the year 1911

defendant loaned on an average, for its various correspondent banks, on collateral, four hundred and eighty thousand dollars. This practice had been carried on by defendant for ten years prior to the trial, and it was in evidence that other national banks in Cincinnati and elsewhere were accustomed to do the same kind of business for their correspondents. (Rec. 24.) It was also in evidence that the Government supplied a form of report to banks, which provided for the statement to the Comptroller of the amount of these loans for correspondents, and no criticism of this method of business had ever been made by the Comptroller. (Rec. 190-191.)

The cashier of plaintiff testified that in accepting these loans on collateral, the personal responsibility of the makers of notes was not considered, but only the value of the collateral. (Rec. 35.)

On December 9, 1911, defendant loaned twenty-five hundred dollars of plaintiff's money to E. E. Galbreath, President of defendant bank, taking eleven shares of the stock of defendant as collateral; and on January 5, 1912, another loan was made to one I. Doyle, who was a stenographer in defendant's bank, for twenty-five hundred dollars, secured by twelve shares of the stock of defendant. After defendant was taken over by the clearing-house of Cincinnati in April, 1912, plaintiff learned that I. Doyle was a stenographer in the bank and that the loan was really for Galbreath. (Rec. 26.)

At the time these loans were made, the board of directors and officers of defendant knew that the bank was in bad financial condition. On March 4, 1911, T. P. Kane, acting Comptroller of the Currency, wrote a letter to the bank and directors, in which he stated that nearly two million dollars of the assets of the bank were subject to criticism. (Rec. 174.) This amount of money involved

the capital and surplus of the bank. This letter was received nine months before the loan of plaintiff's money.

Defendant, during the year 1911, published in the Cincinnati Enquirer five reports of its financial condition, showing that it had a capital and surplus of two million dollars and undivided profits of from one to two hundred thousand dollars. These reports were all published prior to the first loan of plaintiff's money. In other words, although notified by the Comptroller of the impairment of its capital and surplus, it still continued to report a net worth of over two million dollars. In addition to these reports in the newspaper, defendant had sent to plaintiff a short statement in printed form of its financial statement, by mail, for the purpose of soliciting business. (Rec. 32.)

On April 15, 1912, the clearing-house of Cincinnati took over defendant bank for the purpose of conserving its assets; and the Comptroller notified defendant that unless an assessment was made on the stockholders, the bank would be closed out and a receiver appointed. In July, 1912, this assessment was made, and thereupon the bank continued in business by the payment of the assessment by the stockholders.

The two notes held by plaintiff, aggregating five thousand dollars, were not paid at maturity; and as the stock of defendant, held as collateral, was worthless, plaintiff sustained the loss of the loans.

While it is true that at the time of the trial \$835,000.00 had been realized from the criticized assets, yet it is also true that large sums were lost by the bank from other assets not criticized and that the total salvage at the time of the trial, January, 1915, was not to exceed \$200,000. (Rec. 132.)

In other words, the capital and surplus of \$2,000,000 and undivided profits of \$100,000 to \$200,000 as reported in 1911 had not realized to the Bank more than \$200,000 in all up to January, 1915.

ARGUMENT.

At this hearing we understand that the only matter for discussion involve jurisdictional federal questions necessary to enable defendant to be heard in this court. We shall therefore confine ourselves strictly to a discussion of such questions, claiming that no federal questions are fairly presented by the record.

I.

ANSWER TO THE CLAIM THAT "THE ARRANGEMENT WHEREBY THE DEFENDANT UNDERTOOK TO ACT AS AGENT FOR THE OKEANA BANK IN THE MAKING OF LOANS WAS ULTRA VIRES AND THE LAW IMPOSED NO DUTY UPON DEFENDANT FOR ITS ACTIONS AS SUCH ASSUMED AGENT." (Brief Plff. in Error, 24.)

Before discussing the above claim of defendant, we think it would be helpful to consider the exact issue as made by the pleadings in the trial court. Opposing counsel, in their argument, differ from the Ohio courts and ourselves in their view of the issue in the case. The petition claims judgment for five thousand dollars for money which was given defendant as agent to loan upon adequate collateral and which defendant refused to return to plaintiff. Defendant answered that said sum of

money had been loaned by defendant for plaintiff and—that plaintiff approved and confirmed the loans. Plaintiff thereupon in its reply alleged that defendant “did deceive and delude the plaintiff into accepting and approving the said loans to the said E. E. Galbreath.” In detail the reply set out that defendant had published reports showing that the stock of defendant was worth more than two hundred dollars per share, and that at the time said reports were made, defendant had received from the Comptroller notice of the impairment of its entire assets, and knew therefore that said stock at the time was worthless.

It will be seen from this short analysis of the pleadings that the action was a suit for damages against an agent for the wrongful and fraudulent failure of said agent to perform its duties. Practically the only question made by the pleadings was whether or not plaintiff had approved the loans made by defendant. This question depended upon whether or not defendant had made false and untrue reports of its financial condition. Obviously there could be no confirmation of a loan unless plaintiff knew all the facts; and if defendant had deceived plaintiff by its false reports, there was no approval of the loan, and defendant was faithless to its trust as an agent and would therefore be liable in damages.

The jury was fairly instructed as to the issues by the trial court in its charge, as will be seen by reading the entire charge and not a passage here and there. The following part of the court's charge will demonstrate this (Rec. 148):

“Where a confidential relation exists between parties, one of whom is acting for or in behalf of another, there may be and in certain cases there does arise a duty on the part of the former

to disclose or communicate to the latter material facts which the former is in good faith bound to disclose. Whether in the present case the relation of the Second National Bank to the Okeana Bank was of such confidential character with respect to the lending of the latter's funds, and if so whether the knowledge of the Second National Bank, if knowledge it had of the true value of its stock at the time of making these loans, was such as to require of the Second National Bank the disclosure of such knowledge, are questions of fact for the determination of the jury in the light of all the evidence. As I have said to you, the burden is upon the plaintiff to establish that at the time of the making of the Galbreath loan or the Doyle loan or either of them, the value of the Second National Bank stock was materially less than represented by the Second National Bank, and that at such time the Second National Bank knew that the stock had a value substantially less."

We are now in position to argue the alleged federal question raised under this subdivision. Was the act of defendant in loaning money for plaintiff as agent *ultra vires*? We contend that it was not. For ten years prior to the trial defendant had done a large business in loaning the money of correspondent banks. Other national banks have been doing the same kind of business. The Comptroller requires reports from banks of their activities in this line, and no criticism has ever been made of the business. A regularly kept book of the bank contains a record of these loans. It is true that no specific authority is contained in the statutes beyond the general grant of power in Section 5136, "to exercise all such incidental powers as shall be necessary to carry on the busi-

ness of banking." The Comptroller and the banking community generally look upon this practice as within the ordinary incidents of banking business. It enables banks in large cities to obtain the accounts of many small country banks, and it enables the smaller banks to profitably and safely make call loans for money that is not needed in their immediate community.

The criticism made by opposing counsel of this practice is not sound. They say (Brief 25) that in effect the loan made by defendant was a temporary investment in the stock of defendant. In

California Bank v. Kennedy, 167 U. S., 362, at 366,

the Court say:

"No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that, as incidental to the power to loan money on personal security, a bank may in the usual course of doing such business accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders."

To the same effect,

First National Bank v. National Exchange Bank, 92 U. S., 122, 128.

It is difficult to see any merit in opposing counsel's argument along this line. If plaintiff bank could loan on stocks or bonds of companies situated in various parts of the United States, it would certainly not be contrary to the spirit of the banking act for defendant bank at Cin-

cinnati, with larger opportunities, to do the same thing on behalf of plaintiff. It is the business of a bank, wherever situated, to loan money either on ordinary commercial paper or upon paper adequately secured.

It seems to us that the implied approval by the Comptroller of the Currency of the practice of reserve banks loaning money for their correspondents, is a strong argument in favor of the lawfulness of the business. Surely if such loans were not ordinary incidents of banking under the National Banking Act, the bank examiners and the Comptroller would have stopped the practice. Yet we find that under Section 5192 R. S. U. S. the Comptroller designates certain banks in reserve cities, of which Cincinnati is one, to act as agents for keeping three-fifths ($3/5$) of the reserve of fifteen per cent. (15%) of deposits. Reports are regularly made of these loans by both the correspondent banks and the reserve banks to the Comptroller. This course of business is apparently wide-spread. (Rec. 24.) No one seems to have questioned its legality. The Washington authorities permitted it and we can find no federal case directly bearing upon the point after the many years during which the National Banking Laws have been in operation.

Opposing counsel say that plaintiff's cause of action is founded in contract rather than in tort. We do not agree with this view. The Ohio Court of Appeals (Rec. 200) held that it was for a violation of the duty which defendant owed as an agent to its principal.

"We are in accord with the contention in the brief of counsel for The Okeana Bank that this is not an action under the national banking act against the directors, nor is it a suit, in the strict sense of the term, for deceit, but it is an action against The Cincinnati Bank for a viola-

tion of the duty which it owed as an agent to its principal."

In the second edition of *Outlines of Agency by Mechem*, Section 174, it is said:

"If the agent's breach of instructions relates merely to the manner of doing the act, that is, if he does not do it or as he was directed, then the principal's action against him will be an action on the case for damages."

While of course the relation of principal and agent arises out of contract, yet deceit or fraud in the carrying out of the duties of the agent give rise to an action for tort. So here the active fraud or deception carried out by the publication of false reports and the mailing of such reports to plaintiff and the knowing acceptance of worthless collateral, surely do not arise naturally out of the original contract of agency, but are necessarily tortious.

The decisions holding that executory contracts can not be enforced which are *ultra vires* have no application to the present facts. Not only did the acts of defendant result in harm to plaintiff, but they constituted a tort, and in such cases the doctrine of *ultra vires* does not apply. Even assuming, for the sake of argument, that the contract of agency was void for lack of authority, yet defendant would still be liable.

This principle is laid down in

National Bank v. Graham, 100 U. S., 699.

Fannie Graham, the plaintiff, deposited United States bonds with the bank for safekeeping. These bonds were negligently lost by the bank, and suit was brought for

their value. The Court held the bank liable. At the top of page 702, referring to the claim of *ultra vires*, the Court say:

“Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application.

“They are also liable for the acts of their servants while such servants are engaged in the business of their principal, in the same manner and to the same extent that individuals are liable under like circumstances. *Merchants’ Bank v. State Bank*, 10 Wall., 604. An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance, and for libel.”

The same principle of law was laid down in the case of
Anderson v. First National Bank of Grand Forks, 5 N. D., 451.

The Court held that the fact that the act of a national bank in assuming to represent another as agent is *ultra vires*, will not exempt it from the rules of law which regulate the duties of agent to his principal. It can not plead its own violation of law to justify a breach of trust. The Court say, at the bottom of page 455:

“It is one thing to assert that a bank can not legally engage in the business of acting as agent. It is an entirely different thing to assert that when it has in fact assumed to act as agent it shall not be held to the ordinary duties and obligations which govern such a relation.

A bank may repudiate its promise to act as agent when such promise is not binding, and in so doing it will incur no liability. So long as the matter remains executory, it can fall back upon the defense of *ultra vires*. But a widely different question is presented when it has executed or pretended to execute the agency.

A well considered case in Kentucky is to the same effect. In

Bobb v. Savings Bank, 23 Ky. L. Rep., 817, plaintiff left \$20,000 with the cashier of the bank to invest for him. The bank failed and Bobb sued for the amount of money which the cashier agreed to invest for him. The securities could not be found. Held, the bank was liable. Judge Pryor, on page 823, says:

“The bank shows that it had this appellant’s money. If so, where is it and to whom was it loaned? Where is the investment? These are questions easily answered, and the doctrine of *ultra vires* constitutes no defense. While the office of cashier is, as a general rule, purely executive, in the present case the cashier controlled and regulated all the affairs of the bank, the directors and the depositors having the utmost confidence in his personal and official integrity. We will not assume, however, nor is it necessary, that the cashier has usurped the powers of the directors, but we must assume from facts patent on the books of the bank that this was a transaction with the bank, and, therefore, the appellant is entitled to the relief sought. This is not an issue between two innocent parties. The one had a right to trust, and the other must be presumed to have known the character of the undertaking by the bank through its cashier with the appellant. If the bank

should undertake to invest the money of its depositor, it certainly must account either for the money deposited or the investment, and if it fails to do either, a responsibility arises."

Michie on Banks and Banking, Vol. 2, page 1628, Section 195, says:

"The loaning of money on deposit for a customer is within the range of the legitimate business of a bank, unless prohibited by its charter. In so doing the bank acts as the agent of the depositor."

Again in

Emmerling v. First National Bank, 97 Fed., 739, Circuit Court of Appeals for the 8th Circuit, the court say at bottom of page 746:

"The court erred also in instructing the jury that the plaintiff could not recover because the contract was *ultra vires* the bank. Assuming that the contract by which the bank received the plaintiff's securities, and agreed to collect them and reinvest the money for five years, and accept as its compensation therefor all interest received in excess of 8%, was *ultra vires* the bank, the bank is nevertheless under obligation to the plaintiff to return the securities, or account for their value. *American National Bank of Denver v. National Wall Paper Co.*, 77 Fed., 85, and authorities there cited."

The Supreme Court of the United States in

Central Transp. Co. v. The Pullman Co., 139 U. S., 24-60,

Justice Gray says:

“A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation by the law of its creation is incapable of making it, the court, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties so far as could be done consistently with adherence to law by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back or compensation to be made by it.”

The same principle was affirmed in

Logan County Bank v. Townsend, 139 U. S., 62, where the court say, at page 78:

“Our conclusion upon the whole case, so far as the questions arising in it may be reviewed by this court, is that if the bank had no authority to purchase the bonds in question, it is yet not exempt by reason of anything in the National Banking Act, from liability to the plaintiff for the difference between the price paid for them and their value at the time it refused upon plaintiff's demand to comply with the contract made by it for their purchase and held on to the bonds.”

In *National Bank of Commerce v. Equitable Trust Company*, 227 Fed, 526-533 (C. C. A. 8th Cir.), the court say:

“One of the defenses set up in the answer was that the contract between Nicholson and Perry, as representing the bank, was an agreement and transaction into which the bank could not enter, that it was *ultra vires* the bank, and that the bank is not liable for any of its acts under that contract; and this is now relied upon. That

this position can not be maintained, where the proceeding is to recover moneys which have gotten into the hands of the bank but belong to the plaintiff, we need only to call attention to what is said in *Louisiana v. Wood*, 102 U. S., 294--299, and *Citizens Natl. Bank v. Appleton*, 216 U. S., 196."

The United States Supreme Court goes even farther than this, and has decided that where a bank certified checks contrary to law, the bank would, nevertheless, be liable. The doctrine is expressed in the following extracts from

Thompson v. Bank, 146 U. S., 240,
at page 251:

"Moreover, it has been held repeatedly by this court that where the provisions of the national banking act prohibit certain acts by banks or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States and not by private parties. *National Bank v. Matthews*, 98 U. S., 621; *National Bank v. Whitney*, 103 U. S., 99; *National Bank of Xenia v. Stewart*, 107 U. S., 676.

* * * * *

"In *Logan County Bank v. Townsend*, 139 U. S., 67, 77, decided in March, 1891, after the present case was decided by the Court of Appeals of New York, this court approved the decision in *National Bank v. Whitney*, 103 U. S., 99, and said that a disregard by a national bank of the provisions of the act of Congress forbidding it to take a mortgage to secure an indebtedness then existing, as well as future advances, could not be taken advantage of by the debtor, but

'only laid the institution open to proceedings by the government for exercising powers not conferred by law.' "

Counsel cite three cases which they claim to be authority for their position. They have no analogy to the present case.

In

First National Bank v. Hoch, 89 Pa., 324,

the facts were as follows:

One thousand dollars was left with the president of the bank to invest in bonds of the city of Allentown. The money was stolen by the president. The court held that the bank was not liable since it was *ultra vires* to act as broker and as agent in the purchase of bonds and stocks. The real point of the decision, however, is that the transaction was not one by the bank, but a personal transaction of the president, for which the bank was not liable. On page 328 the court say:

"Although the transaction was with Blumer as president of the bank, yet in all legal aspects it was with him as an individual."

This view of the case is made clearer by the fact that the bank never received the money.

In

Weckler v. First National Bank, 42 Md., 581,

the bank undertook to sell railroad bonds for a commission. In order to sell the bonds, a number of false statements were made to induce purchasers to buy the bonds. The court held that the bank was not liable in deceit in the sale of the bonds, for the reason that the selling of bonds on commission is not authorized by a national bank charter. While we believe this decision to be contrary

to the principles laid down in 100 U. S., page 699 yet the facts are quite different from the case at bar.

In

Grow v. Cockrill, 63 Ark., 418 (36 L. R. A., 89), a loan was made to a man named Brown by the cashier of the bank, secured by stock of the bank. The money belonged to Mrs. Grow. It was really used by Allis, an officer of the bank. Later on the bank became insolvent by the wrongful acts of Allis. The statement of facts shows that in a letter by Denny, the cashier, to plaintiff, page 419, he said:

"It seems you are mistaken about the bank securing the loan. I believe I stated that I could get you a loan of \$1,000, secured by the stock of the bank at par, which is good security."

The court ignored this fact in the opinion, and held that the bank was not liable because it was *ultra vires* on the part of the bank to act as broker in making a loan. We submit that the case is not well considered, as it did not refer to the long line of cases decided by the Supreme Court of the U. S., holding that where the contract was executed, the question of *ultra vires* was irrelevant.

II.

ANSWER TO THE CLAIM THAT "A NATIONAL BANK CAN NOT BE MADE TO RESPOND IN DAMAGES WHEN ITS OFFICERS AND DIRECTORS COMMIT A VIOLATION OF THE NATIONAL BANKING ACT WHICH IS IN EFFECT WILFUL."
(Brief, 32.)

The claim here made arises out of the provisions of Section 5239, which is as follows:

"If the directors of any national banking association shall knowingly violate or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders or any other person, shall have sustained in consequence of such violation."

The argument of opposing counsel is that our suit is founded on deceit alone and that an action for deceit can not be brought against a national bank for the publication of false financial statements. They argue that the only action which can be brought under such circumstances is against the directors personally, on the theory that this section excludes any other kind of suit. They quote a number of familiar cases, such as

Scott v. Dewees, 181 U. S., 282, etc.

These cases hold that where a statute defines a right and gives a remedy for its violation, the statute is the exclusive test of liability.

This is undoubtedly the law, but the application to the present case is not clear. If we were suing the directors of the bank, we would undoubtedly have to show that their knowledge of the falsity of the statements made

their act, in permitting them to be published, in effect willful.

The cases of

Yates v. Jones National Bank, 206 U. S., 158,

Thomas v. Taylor, 224 U. S., 73,

Jones National Bank v. Yates, 240 U. S., 541,

decided that the directors of a national bank can only be held liable where the violation of the statute is proven to have been in effect intentional or wilful. In 224 U. S., the court say, at the bottom of page 82:

“Such a disregard of the direction of the officers appointed by the law to examine the affairs of the bank, is a violation of the law. Their directions must be observed. Their function and authority can not be preserved otherwise and be exercised to save the banks from disaster and the public who deal with them and support them from deception.”

These cases do not touch the question of the liability of the bank itself for the act of its officers and agents in publishing or sending out to persons with which the banks deal false statements. There is a vast difference between the liability of the corporation and the liability of directors. The corporation is liable for the acts of its officers within the real or apparent scope of their authority. The directors are only liable for acts in which they personally participate or have cognizance. A bank, like any other corporation is responsible for *whatever* its agents do.

The instant case, however, is not even remotely concerned with this section, because the suit is not one for deceit and is not against the directors. As we have already shown, the pleadings make a case of damages

against the defendant for a breach of duty as agent. The Ohio Court of Appeals (Rec. 200) say on this point:

“We are in accord with the contention in the brief of counsel for the Okeana Bank that this is not an action under the national banking act against the directors, nor is it a suit, in the strict sense of the term, for deceit, but it is an action against the Cincinnati Bank for a violation of the duty which it owed as an agent to its principal.”

The case of

Merchants National Bank v. Armstrong, 65
Fed., 933,

is not in point. All that that case holds is that one who has had no dealing directly with the bank and who accepts as collateral stock of the bank, does not have a claim for deceit against the bank for publishing false statements of its financial condition. It does not even touch the question of the liability of the bank itself for selling its own stock upon the strength of false financial statements. It certainly does not touch the facts in this case, where the bank, acting as agent, takes as collateral for a loan of its principal's money its own stock, which it knew to be worthless.

III.

ANSWER TO THE CLAIM THAT "THE COURT BELOW ERRED IN CHARGING THE JURY THAT IT WAS A QUESTION FOR IT TO DETERMINE WHETHER DEFENDANT HAD INTENDED TO INDUCE PLAINTIFF TO LEND MONEY ON THE SECURITY OF DEFENDANT'S CAPITAL STOCK BY THE PUBLICATION OF THE STATEMENTS, BECAUSE AS A MATTER OF LAW SUCH INTENT CAN NOT BE IMPUTED TO DEFENDANT."

This claim is based upon an erroneous view of the pleadings and a misinterpretation of the charge of the court. It is true that the court, in connection with the statement to the jury that the suit was for a breach of trust upon the part of defendant in making a loan for plaintiff on worthless collateral, also charged the jury with regard to the making of the false statements; but the court did not charge that the case of plaintiff was founded alone upon the latter view of the evidence.

The court, after reading the pleadings, explained that the action was founded upon the confidential relation of principal and agent between plaintiff and defendant, and stated that a duty was owed by an agent to its principal, and that in this case it was for the jury to say, among other facts, whether or not the false statements were made and whether, as a matter of fact, such false statements induced plaintiff to accept the loan made by defendant.

The defendant bank would have been liable to plaintiff even if it had published no statements, provided the condition of the bank was such as was proven in this case, that is to say, that the stock was worthless by reason of the impairment of the capital, pointed out by the

Comptroller of the Currency nine months before the loans were made.

The relevancy of the charge of the court and of the testimony with regard to the falsity and publication of the false statements was that defendant in its answer set out that plaintiff had approved and ratified the loans. By way of reply to this defense plaintiff pleaded that plaintiff had been deceived and deluded into accepting the loans by reason of the deceitful and wrongful act of the defendant in publishing and mailing to defendant false statements of the bank's financial condition.

It was therefore proper for the court to call the attention of the jury to the fact that it was for the jury to determine whether or not the truth of the statements contained in the reply was established by the evidence.

But even if the charge of the court could be construed as applying to a case of deceit alone, the charge would, as a matter of law, be correct. The very case cited by counsel, which we have pointed out has no application to the facts in the instant case, uses this language:

Merchants National Bank v. Armstrong, 65 Fed., 933:

“The conclusion is irresistible that the statute, in requiring reports such as those in question, contemplates merely the persons who deal directly with the bank as a financial institution; that the report, therefore, is directed to them and they only can recover.”

The plaintiff dealt directly with defendant. It acted as plaintiff's agent and it induced plaintiff to accept as collateral its own stock by reason of the published reports and by reason of the substance of said reports mailed to plaintiff.

Along this line is the case of

Hindman v. Bank, 112 Fed., 931.

Judge Lurton, who wrote the opinion, says at the bottom of page 943:

"The true inquiry is, who did the bank design to influence by its false representation? If the representation here involved was not only made to induce favorable action by the state insurance commissioner, but was also intended for the information of all who should be disposed to deal in the company's shares, and who should inspect it for information in respect to the company's capital, it should be regarded as addressed to every such person. So, if the jury should find that the plaintiff was known to the bank as a person disposed to buy such shares, and was referred to this statement for information concerning its capital, they would be justified in finding that the representation was addressed to him personally. Such reference of the plaintiff to the certificate would be a repetition of the misrepresentation addressed directly to him, and render it liable, irrespective of the original design and purpose with which the certificate was given."

The Hindman case was for damages for false representations, whereby plaintiff was induced to buy shares of the capital stock of the Columbian Fire Insurance Company, which shares were alleged to have been worthless.

IV.

ANSWER TO THE CLAIM THAT "PLAINTIFF ACCEPTED THE LOANS AND COLLATERAL COMPLAINED OF AT ITS PERIL BECAUSE IT KNEW THAT GALBREATH, DEFENDANT'S PRESIDENT, HAD A PERSONAL INTEREST IN A TRANSACTION IN WHICH HE REPRESENTED THE DEFENDANT."
(Brief 39.)

We are unable to understand how this claim presents a federal question. Counsel cite the case of

Moore v. Citizens National Bank, 15 Fed., 141,
111 U. S., 156.

This case has no relevancy whatever. The only question involved was as to whether a bank was liable for the act of its cashier in giving a certificate of stock of the bank as collateral for a private loan. The certificate had been filled out without authority from the bank. The Court held that this was purely a personal fraud of the cashier by which the bank was not bound. He did not purport to represent the bank in the transaction, but himself alone. The Supreme Court say, 111 U. S., 165:

"She relied on his personal representation, as the party with whom she was dealing, that he had such stock; and she trusted him as her agent to see the proper transfer thereof made on the books of the bank."

No federal question was raised in this case. It was brought in the United States Court at Cincinnati as the law stood prior to 1882, at which time any suit against a national bank could be brought in the United States

Court. By the acts of July 12, 1882, and August 13, 1888, it was provided that all national banks should be deemed citizens of the states in which they were located, and they had only the rights of suing and being sued which was had by state banks. This whole matter is discussed in the very recent case of

Bankers Trust Co. v. Texas Pac. Ry. Co., 241 U. S., 295, 36 Superior Ct. Rep., 569.

The mere fact that Gutting, the cashier, can bind the Bank by his acts, does not raise a federal question. Every corporation is liable for the acts of its agent. Nor does the fact that the president, Galbreath, borrowed the money constitute a federal question. He did not represent the Bank in the transaction. The Bank acted through its cashier. The Bank is liable for the acts of its cashier under the ordinary principles of corporation and agency law. The cashier was also a director. (Rec. 91.)

We are willing, however, to discuss the general proposition of law made by defendant, even though it has no pertinency in the present discussion. It is true that Galbreath was at the time the loans were made president of defendant. That he had any other connection with the loans than as borrower does not appear in the record. The loans were made by the cashier, J. G. Gutting, as appears from Exhibits 6 and 7. (Rec. 155, 156.) It was not a case of double agency. The testimony shows that the loans were made without regard to the makers of the notes. We did not even know who I. Doyle was. We only learned afterwards that she was a stenographer in the bank. All plaintiff was interested in was to get adequate collateral for the money loaned. The harm done plaintiff was not in loaning to an officer of the bank or

anybody else. It was in accepting collateral which was worthless to the knowledge of defendant.

Opposing counsel say that our knowledge that Galbreath had obtained the loan was a danger-signal, which we disregarded at our peril. Let us follow this argument a moment. To what did the danger-signal point? What inquiries could we have made? If we had gone to Gutting, the cashier, and asked him if the bank was in bad financial condition, notwithstanding the reports which we had received by mail, and had suggested to him that the officers of the bank were possibly all dishonest, and asked his opinion about that, we should probably have incurred the danger of an arrest for provoking a breach of the peace.

The argument of opposing counsel also loses sight of the fact that the burden is on the agent to prove that he has been faithful to his trust. See

Darling v. Younker, 37 O. S., 487.

Isham v. Post, 141 N. Y., 100.

Opposing counsel in conclusion say that this is a hard case on the facts for plaintiff, but that the innocent stockholders at the present time should not stand the loss. This appeal ignores the danger which every stockholder in a corporation assumes when he becomes a stockholder. As between the stockholder who is innocent and a strange party who is injured by the acts of the agent of a corporation, the stockholder necessarily must lose. As the Supreme court of Ohio in

Cincinnati Volksblatt Co. v. Hoffmeister, 62 O. S., 189, 201.

say:

“They (stockholders) have chosen this method of investing their means and conducting the

business for personal profit, a method which, as we have seen, is especially favored by the law, and they should expect to endure such inconveniences, and such chances of exposure of management, as the method entails. In other words, it is not unreasonable that they should be required to take the *bitter with the sweet*."

We submit that the writ of error should be dismissed for the reason that no federal question is fairly raised by the record.

Respectfully,

EDWARD P. MOULINIER,

Attorney for Defendant in Error.

Cincinnati, Ohio, January 10, 1917.

No. 491

October Term, 1916

IN THE

Supreme Court of the United States

THE SECOND NATIONAL BANK OF
CINCINNATI, OHIO,

Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF
OKEANA, OHIO,

Defendant in Error.

File No. 25,312

Brief of Plaintiff in Error on Motion to
Dismiss or Affirm

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INDEX.

STATEMENT OF THE CASE.....	2
THE FACTS	4
ARGUMENT—	
I. Federal Questions Properly Raised.....	10
II. Federal Questions Necessary for the Decision of the Case in the State Courts...	12
A.	12
B.	14
C.	15
D.	16
III. The Motion to Affirm Should Not be Entertained	17
A. The Agreement was <i>ultra vires</i> and Imposed no Duty on Defendant.....	17
B. The National Bank Act Exempts the Bank from Liability in Damages for a Violation of its Terms in Effect Willful	21
C. Statements Required to be Published by the National Bank Act can not be made the Basis of an Action in Deceit	23
D. When Plaintiff Approved the Loans it knew that Galbreath had a Personal Interest in the Transaction and Therefore can not Recover.....	26
APPENDIX	28

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- Adams Express v. Kroninger* (226 U. S. 91), 16.
Anderson v. First National Bank (5 N. D. 460), 17.
Bank v. Graham (100 U. S. 699), 19.
Bank v. Zent (39 O. S. 105), 19.
Barnet v. National Bank (98 U. S. 558), 22.
Bishop v. Countess of Jersey (2 Drew. 143), 18.
Boh v. Savings Bank (23 Ky. Law Rep. 817), 18.
California National Bank v. Kennedy (167 U. S. 362), 13.
Central Transp. Co. v. The Pullman Co. (139 U. S. 62, 78), 19.
Chicago, Burlington & Quincy Railway v. Chicago (166 U. S. 226), 11.
City of Akron v. Roth (88 O. S. 456), 8.
City of New Orleans v. Louisiana (129 U. S. 45), 17.
Dresser v. Traders National Bank (42 N. E. 567), 20.
Emmerling v. First National Bank (87 Fed. 739), 17.
First National Bank v. Hoch (89 Pa. St. 324), 20.
Grow v. Cockrill (63 Ark. 418, 36 L. R. A. 89, 91), 19, 20.
Hasseltine v. Bank (183 U. S. 134), 22.
Yates v. Jours National Bank (206 U. S. 158), 14.
Hayes v. Light & Coal Co. (29 O. S. 330), 19.
Logan County Bank v. Townsend (139 U. S. 62), 17, 18.
Merchants National Bank v. Wehrman (202 U. S. 295), 12.
Merchants National Bank v. Armstrong (65 Fed 932), 16, 23, 25.
Meyer v. Richmond (172 U. S. 82, 93), 11.
Missouri K. & T. R. Co. v. Harriman (227 U. S. 657), 16.
Moores v. Citizens National Bank (111 U. S. 156), 16, 26.

National Bank v. Graham (100 U. S. 693), 17.
National Bank & Loan Company v. Petrie (189 U. S. 423), 17.
National Bank v. Wehrman (202 U. S. 295), 20.
Oates v. Bank (100 U. S. 239), 22.
Stephens v. Bank (111 U. S. 197), 22.
Stratton v. Stratton (239 U. S. 55), 8.
Southern Railway Co. v. Prescott (240 U. S. 632), 16.
Thomas v. Taylor (224 U. S. 73), 14, 21.
Weckler v. First National Bank of Hagerstown (42 Md. 581), 19, 20.
Whitney v. Cook (99 U. S. 607), 17.
Yates v. Jones National Bank (206 U. S. 158, 167), 15.

Supreme Court of the United States

October Term, 1916.

No. 491.

THE SECOND NATIONAL BANK
OF CINCINNATI, OHIO,
Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK
OF OKEANA, OHIO,
Defendant in Error

File No. 25,312.

*Brief of Plaintiff
in Error on Mo-
tion to Dismiss
or to Affirm.*

In his statement of facts, and in his statement of the case, counsel for defendant in error indulges in some inaccuracies in his endeavor to sustain the motion on the ground of the frivolity of the federal questions raised by the writ. Counsel presents a case to the court entirely different from the case presented to the court by the record. Thus counsel states that the claim of plaintiff merely was "That defendant bank had assumed to act as its agent, to in good faith loan money on collateral; that defendant bank instead of acting as agent in good faith loaned money of plaintiff on collateral which defendant knew to be worthless and which plaintiff had every reason to believe was adequate."

Be that as it may, the case was pleaded on the theory that plaintiff in error would be responsible for state-

ments required to be published by the National Bank Act if they were false in fact, and if defendant in error did, and had a right to rely, on such statements provided plaintiff in error intended defendant in error to rely on said statements and if plaintiff in error had conspired to defraud defendant in error by lending money to a known insolvent on collateral known to be worthless. The case was submitted to the jury (R. 148, 150) on the theory set up in plaintiff's brief and on the fraudulent misrepresentation theory; and on the latter hypothesis the statements were made a basis of liability if false in fact or if made recklessly and without regard to whether they were in fact true or false. In justice to our clients therefore, it is necessary to make a more complete and accurate statement of the case and of the facts appearing of record herein.

STATEMENT OF THE CASE.

Adopting for the time being defendant in error's terminology, the plaintiff's petition, filed June 7, 1913, alleges that the plaintiff and defendant are both national banks, the plaintiff doing business at Okeana, Ohio, and the defendant at Cincinnati, Ohio; that the plaintiff opened an account with the defendant and that defendant agreed in consideration of said deposit to lend surplus funds belonging to plaintiff on call loans secured by adequate collateral; that the plaintiff had about \$5,000.00 deposited with defendant on December 9, 1911, payment of which it had demanded on the 22nd of July, 1912, which said repayment defendant refused to make. The petition concludes with a prayer for judgment for \$5,000.00 with interest from the 9th of December, 1911, and for an accounting.

A general demurrer to this petition was overruled.

The allegations of defendant's answer material so far as this motion is concerned, are that defendant had loaned said sum of \$5,000.00 with the knowledge and approval of the plaintiff, and that the plaintiff had in all respects fully ratified, affirmed and approved the loans made by the defendant. The reply as amended (the case was tried on the petition, the answer, and the amended reply) admitted that the loans had been made, but alleged that plaintiff and one E. E. Galbreath, defendant's president, had conspired to defraud plaintiff of \$5,000.00 and that in pursuance of said conspiracy the plaintiff had loaned the sum of \$5,000.00 to said Galbreath, knowing said Galbreath to be insolvent, and had taken as collateral security for said loans stock which defendant knew to be worthless. The reply further alleged:

"that on or about the 11th day of January 1911 and thereafter during said year 1911, the defendant published to the world and delivered to the plaintiff sworn statements of its financial condition, from which it appeared that the said defendant's stock was worth more than Two Hundred Dollars (\$200.00) per share in value, and upon such statement it was intended by the defendant that the plaintiff should, and upon which the plaintiff did rely in its dealings with the defendant, but which statement was false and was known by the defendant to be, and its stock was then worthless and was known by the defendant to be, and that at the time of the making of the said loans, as aforesaid, to the said E. E. Galbreath, and the appropriation of the said moneys from the plaintiff's deposit accounts, as aforesaid, and the taking of the said stock as security, the defendant's bank shares were valueless," (R. 11, 12.)

to defendant's damages in the sum of \$5,000.00. No other pleading was filed by defendant because under section 11329, General Code of Ohio, "new matter alleged in a reply is deemed controverted by the adverse party as upon a denial or avoidance as the case may require." (This statute and all others referred to in this brief are printed in the appendix hereto.)

The issues of fact made by the pleadings were, thus, whether the defendant and said Galbreath had conspired to defraud the plaintiff of \$5,000.00; and whether the defendant had induced plaintiff to make the loans complained of by fraudulent misrepresentations of fact.

THE FACTS.

It is shown by the record that early in January, 1911, plaintiff's cashier arranged with defendant's president, E. E. Galbreath, to open a deposit account on which the defendant was to pay 2½ per cent. on the average daily balance and against which the defendant was, at the request of plaintiff, to charge secured call loans, as well as checks, etc.; that immediately after the opening of this account the defendant was made the plaintiff's reserve agent (Exhibit 5, R. 155). From time to time the defendant charged secured call loans to plaintiff's account pursuant to instructions received from plaintiff. On December 9, 1911, defendant, pursuant to plaintiff's instructions, loaned \$2,500.00 of the money deposited with it to said E. E. Galbreath, its president, known by defendant to be its president, said loan being secured by eleven shares of defendant's capital stock belonging to Galbreath, and charged the loan to plaintiff's account; and on January 5, 1912, a similar loan of \$2,500.00 secured by twelve shares of defendant's capital

stock was made to I. Doyle, for Galbreath's accommodation, by charging this loan to plaintiff's account, Doyle having no real interest in the transaction. The stock securing this note belonged to Galbreath.

The defendant did not then and has not since received one penny of this money (R. 88).

Previous to these loans T. P. Kane, the Deputy and Acting Comptroller of the Currency, criticized the condition of the Second National Bank in the language contained in plaintiff's brief. Mr. Kane's letter further specified certain assets aggregating \$1,543,846.97 which he considered very unsatisfactory for one reason or another. He ordered the defendant to take immediate measures to remove the same from its assets. Four hundred and eighty-seven thousand one hundred and ninety-five dollars and eighty-nine cents (\$487,195.89) was paid on, or charged off, of these assets prior to December 9, 1911; five hundred and ten thousand six hundred and forty-five dollars and eighty-nine cents (\$510,645.89) was paid or charged off prior to January 5, 1912, and eight hundred and thirty-five thousand eight hundred and thirteen dollars and thirty-three cents (\$835,813.33) had been collected at the time of the trial. (Exhibit 49, R. 186, 187.) Between March 4, 1911, and January 5, 1912, the Second National Bank published four statements in the Cincinnati Enquirer as required by Section 5211, R. S. U. S. These statements were an exact copy of the books of the Second National Bank, assets criticised by Mr. Kane and not removed prior to the publication of these statements appearing as assets of the Second National Bank therein. These statements all showed that the Second National Bank had a capital stock of \$1,000,000.00, a surplus of \$1,000,000.00, and undivided profits of between

\$106,874.31 and \$211,268.65, the amount of the undivided profits being different in each report. Plaintiff's cashier saw and read these statements, and, relying upon their truth, approved the loans to Galbreath and Doyle complained of in the petition (R. 35) as soon as he was notified thereof.

The statement in plaintiff's brief that the defendant was insolvent must be due to a misapprehension of counsel.

The fact is that on April 14, 1912, everyone who had theretofore been an officer or director of the Second National Bank resigned as such officer or director or both. The officers and members of the Clearing House of the City of Cincinnati were thereupon appointed directors and officers in their places, and the Clearing House guaranteed the deposits, issuing a public statement to that effect, notifying the world that the defendant was solvent but that its capital stock was impaired (R. 84). On April 18, 1912, the Second National Bank received a notice from the Comptroller of the Currency dated April 15, 1912, that its capital stock had been impaired 100 per cent. and, that unless its stockholders levied an assessment of 100 per cent. upon their stock, that a receiver would be appointed to close up the business of the defendant according to the provisions of Section 5234, R. S. U. S. (R. 72).

This action of the Comptroller of the Currency was published in the Cincinnati newspapers on April 15, 1912, appearing as a special dispatch from Washington (R. 85). With knowledge of these facts Mr. Earnshaw, plaintiff's cashier, on that day came to Cincinnati and took the notes with the collateral securing the same back to Okeana. Although told then that the Doyle loan had

been made for the accommodation of Mr. Galbreath, with this knowledge he thereafter signed four statements acknowledging that the defendant's statement of account to the plaintiff which he represented was correct. (Exhibits "E" to "H" inclusive, R. 189, 190.)

The defendant's stockholders met on July 6, 1912, and resolved to levy an assessment of 100 per cent. on the capital stock, payable on July 18, 1912 (R. 85). The assessment so levied on the stock held as collateral to the two loans was not paid on the date set. The stock was therefore sold on August 22, 1912, at public sale pursuant to the provisions of the Revised Statutes of the United States at a premium of \$167.88, with the stock of other stockholders who had failed to pay the assessment (R. 86, 87). This sum is held by the Second National Bank as a special fund awaiting its owner (R. 82).

At the close of all the evidence and pursuant to the provisions of Section 11447, Ohio General Code, paragraph five, the defendant requested the court to give the following charge:

"2. If you find from the evidence that the plaintiff knew that E. E. Galbreath was the president of the defendant bank, and that the loans in question or either of them were for the benefit and personal interest of the said E. E. Galbreath, I charge you that the defendant can not be held liable for any fraud of the said E. E. Galbreath in the making of any loan to himself in which he was personally interested to the knowledge of the plaintiff." (R. 140.)

This request was refused by the court, and exception reserved by the defendant.

Thereupon the court charged the jury that the defendant was plaintiff's agent and that as such it was the

defendant's duty to make the loans, with such care and such good faith as the relationship demanded and that it was the defendant's duty as agent to make known to the plaintiff any matter connected with the making of the loan and the adequacy of the collateral materially affecting the loan and its security.

And further, that if the plaintiff showed by a preponderance of the evidence that the defendant had represented that its stock was worth more than \$200.00 a share intending the plaintiff to rely on said representation, that if the plaintiff did rely on said representations which the defendant knew to be false, that the plaintiff was entitled to recover (R. 147-149). And further, that if the representations were in fact false and had been made recklessly and without regard to whether they were in fact false or true, the plaintiff would be entitled to recover (R. 150). The jury thereupon retired and returned the verdict for the plaintiff for \$5,899.00. The motions for judgment *non obstante veredicto* and for a new trial were overruled. The case was affirmed by the Court of Appeals on error and the Supreme Court of the State refused to take jurisdiction of the case on the ground that the case was not a case of public or great general interest (R. 197). This decision made the Court of Appeals the last state court of the State of Ohio having jurisdiction. (Constitution of Ohio, Art. 4, Sec. 2; Art. 4, Sec. 6; *City of Akron v. Roth*, 88 O. S. 456; *Stratton v. Stratton*, 239 U. S. 55). Thereupon the Court of Appeals remanded the record to the Superior Court of Cincinnati for execution, and thereafter on April 26, 1916, the writ of error in the case at bar to the Superior Court of Cincinnati was obtained from Mr. Justice Pitney (R. 221).

There are four federal questions raised by the record, insisted upon throughout by the defendant.

(1) The agreement whereby the defendant undertook to make loans for plaintiff was *ultra vires*, and the law therefore imposed no duty upon defendant, as plaintiff's agent. (Assignments of Error I, II, VII, VIII and XIX).

(2) The National Bank Act gives the public the right to know the condition of national banks (Section 5211, R. S. U. S.). In the case at bar statements giving the public this information were issued. In the issuance of such statements there was a violation of the National Bank Act, in effect willful. The sole remedy provided by the National Bank Act is a forfeiture of the national bank's charter (Section 5239, R. S. U. S.). By virtue of that federal statute, therefore, the defendant could not be made to respond to plaintiff's suit for damages, especially for reckless disregard for truth. For the statute creates the right, and provides the remedy, which is exclusive. (Assignments of Error, III, IV, X, XI, XII, XIX, XX, XXIII and XXIV.)

(3) Are the statements required by Section 5211, R. S. U. S. if false in fact published by the bank with the intention of inducing persons to lend money secured by the stock of the bank publishing the statement? (Assignments of Error, V, VI, XIII, XIV, XV, XXI and XXII.)

(4) Persons dealing with agents of national banks, knowing that said agents have a personal interest in the transaction, do so at their peril and can not recover if the agent's acts were fraudulent. Plaintiff knew of Galbreath's personal interest and therefore can not recover for Galbreath's fraud. (Assignments of Error, XVI, XVII, XVIII and XXV.)

ARGUMENT.

I.

Federal Question Properly Raised.

On January 13, 1914, the defendant filed a general demurrer to the petition setting out therein that the petition does not state facts which show a cause of action because of the provisions of the United States Statutes. This demurrer was overruled on March 9, 1914 (R. 4), exceptions being reserved by defendant.

During the course of the trial (R. 21) counsel for defendant moved that that part of a preceding answer in reference to taking call loans be stricken out because it is not within the power of a national bank to do so. The motion was overruled and exception reserved. At the close of all the testimony counsel for defendant asked that the following charge be given.

"2. If you find from the evidence that the plaintiff knew that E. E. Galbreath was the president of the defendant bank, and that the loans in question or either of them were for the benefit and personal interest of the said E. E. Galbreath, I charge you that the defendant can not be held liable for any fraud of the said E. E. Galbreath in the making of any loan to himself in which he was personally interested to the knowledge of the plaintiff." (R. 110.)

Motion overruled and exception reserved. Defendant excepted specially to the charge to the jury "because none of the matters mentioned in our special charges were covered or touched upon by the general charge of the court, and further, that by the general charge of the court we are deprived of a title right and privilege or immunity under the laws and statutes of the United States." (R. 152.)

The jury retired and returned a verdict for the plaintiff, and, within the time allowed by law, defendant filed a motion for a new trial, specifically setting out all the federal questions heretofore referred to and assigned as error in the case at bar (R. 14, 16), and, on the same day, filed a motion for a judgment *non obstante veredicto* assigning as reasons for the ground of said motion all the federal questions raised in the assignments of error in the case at bar. These motions were both overruled (R. 17), and exception reserved.

In its petition in error in the Court of Appeals, defendant again specially claimed all the rights under the federal statutes claimed in the case at bar (R. 192). And the Court of Appeals (R. 196) certified that it had considered and decided adversely to the rights so claimed under the federal statutes.

It is not surprising that counsel for plaintiff does not desire to argue this point in view of the many decisions of this court on the subject. As stated in *Chicago, Burlington & Quincy Railway v. Chicago*, 166 U. S. 42, 220, quoted with approval in *Meyer v. Richmond*, 172 U. S. 82, 93, it is sufficient "If it appears from the record that said right was specially set up as claimed in the state court in such manner as to bring it to the attention of that court." In *Meyer v. Richmond*, 172 U. S. 82, federal questions were not raised until the motion for a new trial. They were again raised in the assignments of error in the last state court having jurisdiction over the cause. This was held to give this court jurisdiction so that even without the certificate of the Court of Appeals, this court would have jurisdiction, since it appears plainly throughout the record that the defendant at all times during the trial, and during the pro-

ceedings in the last state court having jurisdiction, claimed that it was not liable because of the very provisions of the federal statutes which it now claims exempts it from liability. The certificate of the Court of Appeals conclusively shows not only that the federal question was raised, but that it was properly raised under the state practice. Therefore this court has jurisdiction of this case. *Merchants National Bank v. Wehrman*, 202 U. S. 295. For the sake of brevity we will not refer to the many other cases decided by this court supporting this contention. Therefore, unless the case could have been decided on an independent state ground, there is no color of right to the motion to dismiss.

II.

Federal Questions Necessary for the Decision of the Case in the State Courts.

From the statement of the case it is apparent that liability was imposed notwithstanding the provisions of federal statutes. The immunities claimed were not even in the nature of pleas in confession and avoidance. It was and is our claim that by reason of the provisions of the federal statutes there never was any liability to confess or to avoid; that said statutes exempted us from liability; hence a judgment imposing liability must be *adverse* to the federal immunities.

A.

The contract was *ultra vires*, and defendant was under no obligation as agent.

The Court of Appeals held, that although the contract between the plaintiff and defendant might be *ultra vires*, that defendant could not plead its want of power in defense to the action. If such a decision is to deprive

this court of jurisdiction, a state court can deprive this court of jurisdiction whenever any federal question is raised by deciding that although the federal question was properly raised and the federal statute might forbid the act, nevertheless, under the state law that this is no defense to the action. It must be apparent that whether the act is, or is not, *ultra vires*, and whether or not *ultra vires* is a defense to the action are both federal questions. It must further be apparent that state courts can not deprive this court of jurisdiction by leaving the question of immunity in doubt and by deciding that the immunity can not be pleaded.

In this case, as in *California National Bank v. Kennedy*, 167 U. S. 362,

"The federal questions which therefore arise on the record may be thus stated: (1) Do the statutes of the United States (Rev. St. Sections 5136, *et seq.*) relating to the organization and powers of national banks prohibit them from purchasing or subscribing to the stock of another corporation? And (2) If a national bank does not possess such power, can the want of authority be urged by the bank to defeat an attempt to enforce against it the liability of a stockholder?"

And as in *California National Bank v. Kennedy*, 167 U. S. 362,

"In view of the fact that the defendant was a national bank deriving its powers from the statutes of the United States, the averment that a particular transaction of the character of the one in question if entered into was without authority of law, can, in reason, be construed only to relate to the law controlling and governing the conduct of the corporation; that is, the law of the United States."

California Bank v. Kennedy, 167 U. S. 362.

These questions having been thus clearly settled, we will not waste the court's time by reference to the legion of other authorities in point. (We shall point out hereafter that none of the cases cited by plaintiff have any bearing on the merits of the proposition involved in the case at bar.)

B.

Defendant was not liable in damages because the right to learn the condition of national banks from published statements is a right given by the National Bank Act. The statements published were published in such a way as to constitute a violation of the National Bank Act in effect willful, and the National Bank Act, for such violation, gives an exclusive remedy in damages against the directors. The remedy afforded against the bank is a forfeiture of its charter.

In actions against directors it has been held that the directors are responsible only if the statements published were published in such a way as to constitute a violation of the National Bank Act in effect willful. *Yates v. Jones National Bank*, 206 U. S. 158. And in *Thomas v. Taylor*, 224 U. S. 73, it was held that carrying assets as good assets in published statements after a letter similar to the letter in the case at bar had been received from the Comptroller of the Currency constituted a violation of the National Bank Act in effect willful. It was and is our contention that the provisions of the National Bank Act constitute the sole criterion under which liability of any sort may be imposed upon national banks for any violation of its terms. That when a state court imposes liability in damages upon a national bank in express conflict with the terms of the National Bank Act, that the state court has committed egregious error. It is

true that the plaintiff's suit was against the corporation for damages, partly because of a breach of its alleged duty as agent, but the case was not pleaded or submitted to the jury upon the question of a violation of defendant's duty as the plaintiff's agent. Even if the defendant is liable for violation of its duty as agent, which we deny, the jury was charged to return a verdict against the defendant if it found defendant guilty of a breach of its duty as agent, or if it found us guilty of fraud. Certainly this court ought not speculate as to whether the jury imposed liability upon the defendant on the one theory or on the other if there is no liability on either theory.

Here, as in *Yates v. Jones National Bank*, 206 U. S. 158,

"An immunity was claimed under Section 5239 of the Revised Statutes, at least in respect to the rule of liability applied below, and such immunity was expressly denied by the state court, and there is therefore jurisdiction."

Yates v. Jones National Bank, 206 U. S. 158, 167.

A fortiori there is jurisdiction when an immunity is claimed in respect to the existence of a liability as well as in respect to the rule of liability applied below.

C.

Statements required by Section 5211, R. S. U. S., are not published with the intention of inducing persons to lend money secured by the stock of the bank publishing the statements. This question is disregarded by counsel for plaintiff in his motion to dismiss. Stated as a syllogism our contention is that the bank's intentions in issuing such statements can only be such as further its activities as a bank under the National Bank Act; that it is not within the sphere of a national bank's activities

to benefit its stockholders by giving them a commodity readily hypothecated as security for a loan (*Merchants National Bank v. Armstrong*, 65 Fed. 932), and that therefore a jury can not be permitted to impose liability in deceit upon the bank if the national bank did give one of its stockholders such a commodity. Since this whole question depends upon a proper construction of the National Bank Act it is a federal question and a federal question only, just as the question of a national bank's power is exclusively a federal question.

D.

The plaintiff was bound to inquire as to Galbreath's good faith when he acted for the defendant in transactions in which he was personally interested. For some reason not apparent to us plaintiff does not discuss this as a federal question, although assigned as error (Assignments of Error XXV, R. 219). As president of the Second National Bank, Galbreath's sole power to act was granted to him by the federal statute. Under such authority he could not represent himself and the Second National Bank (*Moore v. Citizens National Bank*, 111 U. S. 156), and all persons who knew that he was representing himself knew that he could not also represent the Bank. *Moore v. Citizens National Bank*, 111 U. S. 156. That the determination of this question must be resolved by the application of general principles of the common law does not prevent it from being a federal question.

Adams Express v. Kroninger, 226 U. S. 91.

Missouri K. & T. R. Co. v. Harriman, 227 U. S. 657.

Southern Railway Co. v. Prescott, 240 U. S. 632.

The motion to dismiss is thus obviously without color of right.

III.

The Motion to Affirm Should Not Be Entertained.

A.

THE AGREEMENT WAS *ULTRA VIRES* AND
IMPOSED NO DUTY ON DEFENDANT.

It is thus apparent that there is no color of right to the motion to dismiss. Therefore, the court should not entertain the motion to affirm. *Whitney v. Cook*, 99 U. S. 607; *City of New Orleans v. Louisiana*, 129 U. S. 45. We understand counsel to contend, however, that the *ultra vires* question has already been settled adversely to our contention by the decision in *National Bank v. Graham*, 100 U. S. 693, and that the motion to dismiss should, for that reason, be entertained. The case of *National Bank v. Graham*, 100 U. S. 693, does not apply, in the first place because on page 704 of that case this court holds that the action of the national bank in receiving the special deposits of the bonds lost by the national bank is *intra vires*; in the second place, in that case, in *Logan County Bank v. Townsends*, 139 U. S. 62, in *Emmerling v. First National Bank*, 87 Fed. 739, and in *Anderson v. First National Bank*, 5 N. D. 460, on which counsel rely, the action was in disaffirmance of the contract.

The foundation of plaintiff's claim as stated by plaintiff in the case at bar, is an affirmance of the contract. For the duty to loan money in good faith on collateral would have been non-existent but for the contract. The question of the liability of a national bank as an agent where the action is in affirmance of an *ultra vires* contract is expressly left open for decision in *National Bank & Loan Company v. Petric*, 189 U. S. 423, so that the motion to affirm must be denied unless the *ultra vires* contention is obviously frivolous.

Section 5136 of the Revised Statutes does not give a national bank the power to enter into such a contract as was entered into in the case at bar. Therefore the contract entered into was *ultra vires*. *Logan County Bank v. Townsend*, 139 U. S. 69. The rule that national banks have only such powers as are expressly given by the National Bank Act is so well settled that no further authorities will be cited to sustain it. It is also well settled that English banks have not the power to invest or make loans for their customers. Thus in *Bishop v. Countess of Jersey*, 2 Drew. 143, the plaintiff brought suit against a private bank to recover from the bank, money which the bank's managing agent had received to invest for its customer, and which had been invested by said managing agent by loan to his son. The loan turned out to be worthless and the suit was brought against the bank on a basis similar to the basis claimed for plaintiff in the case at bar. It was held that there could be no recovery against the bank. Thus at the time of the enactment of the National Bank Act private banks did not have the power to do what the defendant did in the case at bar. The power was not included in Section 5136 and since it was not at that time considered a power incidental to the ordinary business of banking, it would for that reason alone be excluded from the powers granted by Section 5136, even without the rule that a national bank's powers are strictly limited to those contained in said section. The case of *Bobb v. Savings Bank*, 23 Ky. Law Rep. 817, involves the powers of a Kentucky state bank. In *Bolles on Banks and Banking*, 234, and in the second edition of *Magee on Banks and Banking*, 431, it is pointed out that although state banks have the power to invest their customer's funds, the better view is that national banks have not such power.

This is the express holding of the Supreme Court of Arkansas in *Grow v. Cockrill*, 63 Arkansas, 418, 36 L. R. A. 89. The cases of *Central Transp. Co. v. The Pullman Co.*, 139 U. S. 62, 78, and of *Hayes v. Light & Coal Co.*, 29 O. S. 330, do not involve the question of a national bank's powers. And *Bank v. Zent*, 39 O. S. 105, follows this court's ruling in *Bank v. Graham*, 100 U. S. 699, to the effect that a national bank has the power to receive special deposits. In *Grow v. Cockrill*, 63 Ark. 418, 36 L. R. A. 89, 91, the court says:

"There is no showing that the bank, by its charter, had authority to transact such business as that of loaning the money of its depositors or other people in general. Such authority we have failed to find in the National Banking Law, and the decisions on the subject, or rather the decisions involving analogous facts, all seem to be to the effect that the business of a broker (and a broker's business is to loan the money of others, or borrow for others, and such like), is not a business in which a national bank can lawfully engage, since it is not mentioned in the National Bank Act and the act is strictly construed as against the grantee corporation, as to the powers conferred as in all cases of private corporate grants of power. In the case, *Weckler v. First National Bank of Hagerstown*, 42 Md. 581, a suit was brought against the bank for damages growing out of the purchase of certain bonds which the teller of the bank had sold him, and falsely represented to be what they really were not, to the injury of the plaintiff, the complaint averring that the bank was engaged in buying and selling these bonds, and was therefore liable for damages occasioned by the false representation, in relation thereto of the teller, one of the agents in the transaction of its business. The plaintiff was defeated in his suit, the court holding that the bank had no authority to transact that kind

of business, and the teller was therefor not acting within the scope of his authority and business when he committed the torts complained of. To the same effect is the rule in the case of *First National Bank v. Hoch*, 89 Pa. St. 324, and that in the case of *Dresser v. Traders National Bank*, 42 N. E. 567."

The cases of *Weckler v. First National Bank*, 42 Md. 81; *First National Bank v. Hoch*, 89 Pa. 321, and the case of *Grow v. Cockrill*, 63 Ark. 418, are all cases like the case at bar in that they were brought in affirmance of the *ultra vires* contract. In all of them it was held that the plea of *ultra vires* was a defense to the association which had entered into the contract. In the *Weckler* case and in the *Hoch* case the bank had acted as a broker in selling securities to a customer instead of acting as broker in selling the customer loans, and, as in the case at bar, induced the customer to purchase the securities by fraudulent representations. In both of the cases it was held that the corporation was not responsible for the fraud because the representations were made beyond the known scope of the bank's authority, or because the whole transaction was *ultra vires*. That is exactly the situation in the case at bar. The plaintiff was bound to know that the act was *ultra vires* and that all representations made to induce an act in the furtherance of the contract were beyond the scope of the bank's powers. And since the contract was *ultra vires*, it imposed no liability on defendant. *National Bank v. Wehrman*, 202 U. S. 295. The plaintiff can no more recover than could the plaintiff in the *Weckler* and *Hoch* cases. Not only is plaintiff's contention that this claim is frivolous not ruled by the decisions of this court, but the question has been expressly reserved for decision by this

court, and what authority there is exempts the defendant from liability. With such a state of authorities the contention can not be frivolous.

B.

**THE NATIONAL BANK ACT EXEMPTS THE BANK
FROM LIABILITY IN DAMAGES FOR A
VIOLATION OF ITS TERMS IN
EFFECT WILLFUL.**

It is not claimed that the second federal question is ruled by the decisions of this court, the only claim being that it forms no basis of the case because the case is one of agency only. If the case had been pleaded or submitted to the jury only on the question of whether defendant had violated its duty as agent or not this might be true. But as pointed out heretofore the amended reply alleged that defendant had made fraudulent misrepresentations, and the jury was instructed to return a verdict in damages against us if it found that the statements were fraudulent, or if it found that the statements were published with reckless disregard of their truth, or if defendant had violated its duty as agent. The question of liability under Sections 5211 and 5239 was thus brought into the case by plaintiff, and kept there by the courts below.

In *Thomas v. Taylor*, 224 U. S. 73, this court held that the publication of the statements under circumstances similar to those under which they were published in the case at bar constitutes a violation of the National Bank Act in effect willful. Since the National Bank Act itself provides that there shall be no liability in damages for such a violation of its terms, we can not believe that a claim of exemption from such liability by virtue of the provisions of the act itself will be considered a frivolous

claim in a case in which damages were imposed upon a defendant by a jury under a charge which disregarded the terms of the National Bank Act. Especially in view of this court's holdings that where the National Bank Act creates a right and provides a remedy, that the remedy provided is exclusive. *Barnet v. National Bank*, 98 U. S. 558; *Oates v. Bank*, 100 U. S. 239; *Stephens v. Bank*, 111 U. S. 197; *Hasseltine v. Bank*, 183 U. S. 134. It is our contention here and regarding the third federal question raised by the record that the exemption from liability for the damages here imposed was within the express contemplation of the Congress which enacted the National Bank Act. That Congress, mindful of the fact that corporations can only act through individuals, had, by the enactment of Section 5205, R. S. U. S., given national banks the right to rehabilitate themselves upon the impairment of their capital stock. That known human infirmities caused that Congress to place the liability in damages for all violations of the act upon the directors themselves, because the directors themselves, who knowingly violate, or who knowingly permit the bank's officers to violate, the terms of the National Bank Act, must be the human agents of the corporation to commit, and to profit, by any violations of the terms of the National Bank Act. For the directors, and not the association profited particularly by the violation of the National Bank Act in the case at bar. It was the directors, not the association, who owned the stock, and it was the directors, not the association, who wanted to sell their holdings in the association or borrow on the security of its collateral. It made no difference to the association, as an association, whether its stock had a market value of one, or of a million. In either event it could do business. But if the stock was advertised as worth \$250.00 a

share and the directors were able to sell their stock for \$250.00, it meant money in the pockets of the directors.

We submit that by making the persons profiting by the violation of the National Bank Act liable in damages, and by reserving to the Comptroller of the Currency the right to forfeit the bank's charter unless it reformed, that Congress showed that it did not intend to make the association which did not profit by the violation, respond in damages. And by reserving to the Comptroller of the Currency the right to punish the association for the action by forfeiture of its charter if the association did not repent and amend its ways, Congress further intended to give the association a *locus penitentiae*. In the case at bar the association has repented and has amended its ways and has elected a new board of directors who did not at any time participate in the wrongs complained of in the case at bar. The Comptroller of the Currency has long had notice of the violations of the National Bank Act in the case at bar and has refused to bring an action for the forfeiture of defendant's charter. Since the National Bank Act gives the Comptroller of Currency the sole remedy against the association which he has declined to press, our contention that others shall not press a remedy which is denied by the National Bank Act can not be frivolous.

C.

STATEMENTS REQUIRED TO BE PUBLISHED BY THE NATIONAL BANK ACT CAN NOT BE MADE THE BASIS OF AN ACTION IN DECEIT.

Our contention here has been decided just once. In that case the decision was favorable to the contention. *Merchants National Bank v. Armstrong*, 65 Fed. 932.

We contended in the courts below that the state courts should follow the decision of the federal courts in construing federal statutes. The courts below decided adversely to our contention in this. The decision cited is a decision of the Circuit Court for the Southern District of Ohio, Western Division, and since it can not be an authority in this court the matter is one of first impression. But the reasoning of the decision is so able that we use it instead of our own.

"It is further urged that the publication is not intended alone for those who are stockholders and depositors at the date of the report, because notice of its contents could be brought home to them in a less public manner, and that the making and publishing of the reports must be for the further purpose of informing those who may contemplate dealings with the bank, or may be brought into connection with it, in any way in which the financial condition of the bank would be a consideration of moment. For illustrations, owners of shares of stock, those about to purchase such shares, and third parties having dealings in the stock, entirely independent of and apart from the bank, are referred to. In short, the claim is that the reports were addressed to the general public, and the plaintiff, having acted upon them, was misled to its damage, and entitled to recover. The reports were not made voluntarily, but in compliance with the requirement of the statute. They must be taken to be made only to those within the contemplation and protection of the statute. Experience teaches that the danger of banks, as distinguished from other corporations or agencies for the transaction of business, is not in the fact that their stock may be issued and bought and sold on the market, but in their power to issue notes, receive deposits, and make discounts. The government has always shown a disposition to regulate banks in

order to secure the public against the misuse of these functions. The act is entitled, 'An act to provide a national currency.' It is entirely directed to providing for the safety of the note issue and the security of the discount and deposits. All its substantial provisions, of which there are a number, including the one under discussion, are directed to that end. The conclusion is inescapable that the statute, in requiring reports such as those in question, contemplates merely the persons who deal directly with the bank as a financial institution; that the report, therefore, is directed to them, and that only can recover. Besides its title and the bank, and holders of it as collateral, are not, under the statute, privy to the reports, and, if directed or misled by them, they can not recover against the bank. Cf. *United States v. Bank of Italy*, 100 U.S. 367, where it is said that 'some representations are made for the express purpose of inducing individuals or the public to act upon them and whoever is first thus deceived, misled, and act upon them, in the manner intended, has a right to regard them as made to him, and treat them as frauds upon him, if in fact he was deceived to his damage.' But, in the view just taken, the bank can not be held to have issued the reports for the purpose of inducing transactions such as that set forth in the petition, and the statute, therefore, does not apply."

Greenbank Nat. Bank v. Boardman, 42 Fed. 985, 986, 987.

It was argued in the course below that the plaintiff was a privy to the reports because of the relation of agency between the plaintiff and defendant. The weight of this contention is not apparent. For the purpose for which the reports were published can not be enlarged by the creation of a relationship not in contemplation by the action of the statute requiring the publication of

the statements. Plaintiff's claim for damages is not that he opened an account with defendant because of the fraudulent misrepresentations, but because he loaned money secured by the stock of the publishing bank relying on the fraudulent misrepresentations. Every cent that the plaintiff had on deposit with the defendant was repaid plaintiff at the time plaintiff closed its account with defendant. Plaintiff's only claim in this regard is for damages because of the alleged fraud which induced plaintiff to lend its money secured by defendant's capital stock.

D.

When Plaintiff Approved the Loans it Knew that Galbreath had a Personal Interest in the Transaction and Therefore Can Not Recover.

Plaintiff knew on December 9, 1911, that E. E. Galbreath, president of the Second National Bank, had caused the Second National Bank to charge \$2,500.00 to plaintiff's account for a loan to himself, secured by some of his stock in the defendant, and it had the same knowledge on April 15, 1912, about the loan made on January 9, 1912. If, as plaintiff contends, the defendant was under obligations to it not to make this charge without notifying it of all facts concerning the collateral, defendant's president was under the obligation to defendant to see that defendant fulfilled all its obligations to plaintiff. When defendant's president undertook to borrow this money for himself he had a personal interest in the transaction which conflicted with his duties as defendant's president. Since plaintiff knew of this adverse interest it was not an innocent taker of the loan and took it at its peril. And further, defendant's president did not have authority to act for himself and for the defendant, and of this, too, the plaintiff had notice. *Morse v. Bank,*

111 U. S. 136. Therefore plaintiff is not entitled to a recovery.

We respectfully submit that the motion to dismiss should be overruled because the record clearly shows that the very federal questions relied upon in the case at bar were specially set up and relied upon during all the proceedings in the courts below and that the motion to affirm should not be entertained because there is no color of right on the record to the motion to dismiss, and further, because in every instance in which the federal courts have decided any of the questions involved in the case at bar, the decisions are favorable to the contentions here raised.

FERDINAND JELKE, JR.,

LANDON L. FORCHHEIMER,

Attorneys for Plaintiff in Error.

Cincinnati, Ohio, October 16, 1916.

APPENDIX.

"Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

"First: To adopt and use a corporate seal.

"Second: To have succession for the period of twenty years from its organization, unless it is sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law.

"Third: To make contracts.

"Fourth: To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.

"Fifth: To elect and appoint directors, and by its board of directors to appoint a president, vice-president, cashier and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

"Sixth: To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its general business conduct, and the privilege granted to it by law exercised as follows:

"To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this Title.

"But no association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of Currency to commence the business of banking." *Section 5136, Revised Statutes of the United States.*

"Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders *pro rata* for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four. *And provided,* That if any shareholder or shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto), to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders." *Section 5205, Revised Statutes of the United States.*

"Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him,

verified by the oath or affirmation of the president or the cashier of such association, and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified; and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him, and in the same form in which it is made to the Comptroller shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition." *Section 5211, Revised Statutes of the United States.*

"On becoming satisfied, as specified in sections fifty-two hundred and twenty-six and fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debt, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comp-

troller of all his acts and proceedings." *Section 5234, Revised Statutes of the United States.*

"From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held." *Section 5236, Revised Statutes of the United States.*

"If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this Title, all the rights, privileges and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders or any other person, shall have sustained in consequence of such violation." *Section 5239, Revised Statutes of the United States.*

The only material portions of Article 4, Section 2, and of Article 4, Section 6, of the Constitution of Ohio, are:

Art. 4, Sec. 2. "It (the Supreme Court) shall have original jurisdiction in quo warranto, mandamus, habeas

corpus, prohibition and procedendo, and appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state, in cases of felony on leave first obtained, and in cases which originated in the Courts of Appeals, and such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law." * * * "In cases of public or great general interest the Supreme Court may, within such limitation of time as may be prescribed by law, direct any Court of Appeals to certify its record to the Supreme Court, and may review, and affirm, modify or reverse the judgment of the Court of Appeals. All cases pending in the Supreme Court at the time of the adoption of this amendment by the people, shall proceed to judgment in the manner provided by existing law. No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the Supreme Court." (As amended September 3, 1912.)

Art. 4, Sec. 6. "The Courts of Appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in the trial of chancery cases, and, to review, affirm, modify or reverse the judgments of the Courts of Common Pleas, Superior Courts and other courts of record within the district as may be provided by law, and judgments of the Courts of Appeals shall be final in all cases, except cases involving questions arising under the constitution of the United States or of this state, cases of felony, cases of which it has original jurisdiction, and cases of public or great general interest in which the Supreme Court may direct any Court of Appeals to certify its record to that court." (As amended September 3, 1912.)

"Sec. 11329. Excepting averments as to value, or the amount of damage, for the purposes of an action, every material allegation of a petition, not controverted by the answer, and every material allegation of new matter

in an answer not controverted by the reply, shall be taken as true. New matter alleged in a reply shall be deemed controverted by the adverse party as upon a denial or avoidance as the case may require." (General Code of Ohio.)

"Sec. 11447. Sec. 5. When the evidence is concluded, either party may present written instructions to the court on matters of law, and request them to be given to the jury, which instructions shall be given or refused by the court before the argument to the jury is commenced." (General Code of Ohio.)



FILED
OCT 9 1916
JAMES D. MAHE
CLERK

No. 491.

Supreme Court of the United States.

OCTOBER TERM, 1916.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO, a
banking association organized and existing under the
laws of the United States of America,

Plaintiff in Error,

versus

THE FIRST NATIONAL BANK OF OKEANA, OHIO, a bank-
ing association organized and existing under the laws of
the United States of America,

Defendant in Error.

**Motion to Dismiss or to Affirm, and Brief of Defend-
ant in Error on Said Motion.**

EDWARD P. MOULINIER,
Counsel for Defendant in Error.



Supreme Court of the United States.

October Term, 1916.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO, a banking association organized and existing under the laws of the United States of America,

Plaintiff in Error,

No. 491.

vs.

THE FIRST NATIONAL BANK OF OKEANA, OHIO, a banking association organized and existing under the laws of the United States of America,
Defendant in Error.

Motion to Dismiss or to Affirm.

Now comes defendant in error, by its counsel, and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction because a Federal question was not properly raised in the court below and no Federal question is involved.

And said defendant in error, by its counsel as aforesaid, also moves the court to affirm the judgment from which said writ of error purports to have been taken,

because, although the record in said case may show jurisdiction in the premises, yet it is manifest that said writ of error was taken for delay only, and that the questions presented by the assignments of error are as frivolous as not to need further argument.

EDWARD F. MORTIMER,

Counsel for Defendant in Error.

Supreme Court of the United States.

October Term, 1912.

**THE SECOND NATIONAL BUREAU OF CIVIL
RIGHTS, INC.**, a leading association organized and
existing under the laws of the United States of
America,

Plaintiff in Error,

No. 618.

vs.

**THE FIRST NATIONAL BUREAU OF CIVIL
RIGHTS, INC.**, a leading association organized and existing
under the laws of the United States of America,

Defendant in Error.

Notice of Submission of Petition to Discharge of its Officers.

*By Messrs. F. J. B. Co., Jr., and Gordon H. Frothingham,
Cincinnati, Ohio,*

Counsel for Plaintiff in Error.

These folks notice that on the sixth day of November,
1912, at the opening of the term, or as soon thereafter
as counsel can be heard, the motions of which the fol-
lowing are copies, will be submitted to the Supreme Court

of the United States for the decision of said court thereon. Attached hereto is a copy of the brief of the argument to be submitted with the said motions in support thereof.

EDWARD P. MOULINER,
Counsel for Defendant in Error.

Received a copy of the above-mentioned motions and brief this 2nd day of October, 1916.

F. JONES, JR.,
LAWSON L. FURCHHEIMER,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

October Term, 1916.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO, a banking association organized and existing under the laws of the United States of America,

Plaintiff in Error,

No. 491.

vs.

THE FIRST NATIONAL BANK OF OKEANA, OHIO, a banking association organized and existing under the laws of the United States of America,
Defendant in Error.

Brief of Defendant in Error on Motion to Dismiss or Affirm.

STATEMENT OF THE CASE.

The suit was commenced originally in the Superior Court of Cincinnati by The First National Bank of Okeana, Ohio, against The Second National Bank of Cincinnati, Ohio. On March 31st, 1915, a verdict was rendered for plaintiff for \$5,829. The case was taken on error to the Court of Appeals of Hamilton County, and

the judgment there affirmed. Thereupon, an application for leave to file a petition in error was made to the Supreme Court of Ohio, which was refused. The present petition in error was taken to the decision of the Court of Appeals, which under the Ohio law is a court of final jurisdiction.

STATEMENT OF THE FACTS.

For the sake of brevity, we shall call the Okeana National Bank plaintiff and the Second National Bank defendant, although in this court the former is defendant in error and the latter plaintiff in error.

The issue made by the pleadings is simple. Plaintiff sued on a contract to perform services on the part of defendant for plaintiff; these services consisted in defendant's acting as agent for plaintiff in loaning money out upon adequate collateral; plaintiff demanded repayment of the money placed in defendant's hands, which payment was refused; an accounting was asked for; defendant answered that the money had been loaned, and the loan approved by plaintiff; plaintiff replied that with knowledge on the part of defendant, it knowingly took worthless collateral for the money of plaintiff, and that by reason of this breach of duty on the part of its agent, of which it was ignorant, plaintiff was entitled to recover the amount of the loans.

The evidence very briefly discloses the following facts:

Early in January, 1911, the cashier of plaintiff arranged with Galbreath, president of defendant, for the opening of an account. Galbreath agreed to pay $2\frac{1}{2}\%$ on daily balances and, in consideration of getting the account, agreed to make loans for plaintiff.

After this contract was made, defendant loaned for plaintiff various sums of money amounting to \$25,000. During the year 1911, defendant Bank loaned on an average for its various customers on collateral the sum of \$480,000. This practice had been carried on by defendant bank for ten years prior to the trial.

On December 9th, 1911, defendant loaned \$2,500 of plaintiff's money to E. E. Galbreath, president of defendant bank, taking 11 shares of the stock of defendant bank as collateral, and on January 5, 1912, another loan was made to one I. Doyle for \$2,500, secured by 12 shares of the stock of defendant bank.

Defendant bank at the time these loans were made was insolvent, and the board of directors and officers of the bank were aware of its condition. On March 4, 1911, T. P. Kane, acting Comptroller of the Currency at Washington, wrote a letter to the bank and directors in which this language occurred (Rec., 174):

"In view of the foregoing, the condition of your Bank must be regarded as very unsatisfactory. The estimated losses, the questionable assets, and other assets which for one reason or another are subject to criticism, aggregate nearly two million dollars. Many of the objectionable loans are of long standing, and appear to be in worse condition than ever before, and on the whole very little progress has been made in remedying conditions repeatedly criticised by the examiners and this office."

This was nine months before the loan of plaintiff's money.

The reports of the defendant bank, as shown by the *Cincinnati Enquirer*, dates of January 11, 1911, March 10, 1911, June 10, 1911, September 6, 1911, and December

8th, 1911, stated that defendant bank had a capital and surplus of two million dollars and undivided profits of from one hundred to over two hundred thousand dollars. In other words, the bank, although its capital and surplus had been wiped away, still continued to make reports and advertise that it had over two million dollars of assets.

On April 15, 1912, the Clearing House of Cincinnati took over defendant bank, and in July, 1912, an assessment was made on the stockholders for the full amount of their stockholdings. The action of the stockholders in paying assessments prevented the liquidation of the bank by the Comptroller.

The notes aggregating five thousand dollars held by plaintiff were not paid, and as the stock of the Second National Bank held as collateral was worthless, plaintiff bank sustained the loss of the loans.

It will be seen from the above statement that the claim of plaintiff merely was, that defendant bank had assumed to act as its agent to in good faith loan money on collateral; that defendant bank, instead of acting as agent in good faith, loaned money of plaintiff on collateral which defendant knew to be worthless and which plaintiff had every reason to believe was adequate. It was a suit therefore brought in the state courts to hold a national bank on the ordinary principles of agency for a violation of duty as agent.

ARGUMENT.

I.

FEDERAL QUESTION NOT PROPERLY RAISED.

We do not desire to argue this point, but merely state it. A demurrer was filed in the trial court on January 13, 1914 (Rec., 4), the ground of the demurrer being "that the petition does not state facts which show a cause of action, because of the provisions of the laws of the United States." The printed record does not disclose that this matter was referred to during the reception of evidence, although the original record does contain the contention of defendant that the bank had no power to make loans for customers. At the close of the charge of the court, counsel for defendant excepted to the charge with the statement that, "by the general charge of the court, we are deprived of a title right and privilege or immunity under the laws and statutes of the United States." (Rec., 152.)

In the motion for a new trial before the trial court (Rec., 15), it is set out that the court erred in admitting evidence and ruling on matters of law that deprived defendant of a right and privilege under the following sections of the United States Statutes: Sections 5134, 5136, 5147, 5155, 5190, 5211 and 4239. The same claims were made in the petition in error (Rec., 192), filed in the Court of Appeals of Hamilton County, and the certificate of the Court of Appeals (Rec., 196), recites that federal questions were raised.

II.

FEDERAL QUESTION NOT NECESSARY FOR DECISION OF THE
CASE IN THE STATE COURTS.

In the Ohio courts only two federal questions were argued. The first was that no power was granted under the National Banking act for a National Bank to act as agent to loan money for a depositor; and that therefore such acts were *ultra vires*. The second was that the only remedy plaintiff had was a suit against the directors to enforce their personal responsibility under Section 5239, R. S. U. S. We will take up these points in their order.

No. 1.

Ultra Vires.

Section 5136 relates to the corporate powers of banking associations. No. 7 of the enumeration of powers reads: "To exercise all such incidental powers as shall be necessary to carry on the business of banking." It is claimed by opposing counsel that a national bank can not act as agent for another bank to loan money because such power is not specifically given in Section 5136, and is not to be implied under subdivision No. 7 just quoted. The state court of appeals in its opinion (Rec., 200) on this point say:

"Counsel for plaintiff in error contend that the conduct of the Cincinnati Bank was *ultra vires* and that, for this reason, it is not liable in this action. Even if we should assume that the transaction was beyond the authority of a national bank, it would not follow that plaintiff

would be thereby debarred from a recovery, and the contention can not be sustained."

The court holds that even if it be conceded that the transaction was *ultra vires*, defendant bank would not be relieved of its liability for the reason that having acted as agent, it would be liable under ordinary principles of law for bad faith in its acts as agent. This principle was clearly established in *National Bank v. Graham*, 100 U. S., 699. In this case, a national bank assumed to act as a depository for the safekeeping of bonds. The bonds were lost and the owner brought suit against the bank for the value of the bonds. The bank defended on the ground that it could not act as a depository and, therefore should not be held liable. The court say of this contention, bottom of page 701:

"Conceding for the moment that the contract was illegal and void for the reason alleged in behalf of the bank, the consequence insisted upon would by no means follow."

Also further along on page 702:

"Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application."

To the same effect are the following cases:

Anderson v. The First National Bank of Grand Forks, 5 N. D., 451.

Bank v. Zent, 39 O. S., 105.

Hayes v. Light & Coal Co., 29 O. S., 330.

Bobb v. Savings Bank, 23 Ky. L. Rep., 817.

Emmerling v. First National Bank, 97 Fed., 739.

Central Transp. Co. v. The Pullman Co., 139 U. S., 24-60.

Logan County Bank v. Townsend, 139 U. S., 62-78.

Thompson v. Bank, 146 U. S., 240-251.

It appears clearly from these cases that even if we concede that the conduct of defendant bank in acting as agent was *ultra vires*, which question was not necessary to be decided, the bank would still be liable upon ordinary principles of the law relating to corporations and agency. So far then as the defense of *ultra vires* is concerned, that question was not necessary for a decision, and the Ohio court expressly so held.

No. 2.

The Other Alleged Federal Question Involved *Section 5239.*

This section is as follows:

“If the directors of any national banking association shall knowingly violate or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders or any other person, shall have sustained in consequence of such violation.”

The argument of counsel for the bank was, that the only liability on the part of the bank or any one connected with it was a suit against the directors personally or a suit brought by the Comptroller of the Currency for a dissolution of the banking association. The reasoning on this point was, that since the statutes gave a remedy, this remedy was exclusive and no other form of suit could be brought.

There is in this contention of counsel a wholly unwarranted position. We very readily concede that, if the suit had been against the directors, it would have been under this section and we should have been compelled to prove a knowing violation of the statute in order to hold the directors personally responsible.

Yates v. Jones National Bank, 206 U. S., 158.
Thomas v. Taylor, 224 U. S., 73.

Our suit, however, was not brought under the statutes of the United States. We did not sue the directors at all. Our suit was against the corporation, The Second National Bank, for damages for a violation of its duty owing to us as our agent. The claim of counsel that this section of the United States Statutes has any application is not even remotely meritorious. Our suit in no way involves this section, and we can not see how the fanciful resort to the claim in this court entitles counsel for defendant to the right to say that a federal statute is involved. There is a vast difference between the liability of a corporation and the personal liability of directors. The corporation is liable for the acts of its officers within the real or apparent scope of their authority. The directors are only liable for wrongful acts in which they knowingly participate. The latter liability is alone involved in Section 5229.

The Court of Appeals (Rec., 200) say on this point:

"We are in accord with the contention in the brief of counsel for the Okeana bank that this is not an action under the national banking act against the directors, nor is it a suit, in the strict sense of the term, for deceit, but it is an action against the Cincinnati bank for a violation of the duty which it owed as an agent to its principal."

There are no authorities bearing on the question, probably for the reason that no one before ever considered seriously that a suit against a bank for violation of duty as an agent had anything to do with Section 5229, R. S. U. S., which only involves the personal liability of directors. We, submit therefore, that no federal question was either necessary for the determination of the case in the state courts, nor was such a question decided by said courts. Opposing counsel with equal merit might have claimed that the judgment was rendered without due process of law and therefore was in violation of the Constitution of the United States. The mere assertion of a federal question, unless fairly involved, does not warrant a resort to this court.

As said by Mr. Justice Peckham in *Wilson v. North Carolina*, 169 U. S., 286, citing from page 285:

"In *Hamlin v. Western Land Company*, 147 U. S., 531, it was stated that 'a real, and not a fictitious, Federal question is essential to the jurisdiction of this court over the judgments of state courts.' *Mulligan v. Hartop*, 6 Wall., 228; *New Orleans v. New Orleans Water Works Co.*, 142 U. S., 78, 87. In the latter case it was said that 'the bare avowment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at

least color of ground for each averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay." "

It is not necessary to refer to the many decisions of the Supreme Court on the point as to necessity of federal question being decided by state court, and we content ourselves with citing *California Powder Works v. Davis*, 151 U. S., 292, in which the court say:

"It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a state in which a decision is the only one that could be had, it must appear affirmatively not only that a federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment so rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented."

See, also,

Baron v. Texas, 145 U. S., 297-298.

Branger v. Texas, 138 U. S., 397-400.

We respectfully submit that the motion to dismiss be granted.

E. W. P. Maclean

Attorney for Defendant in Error.

Cincinnati, Ohio, September 30, 1934.

OHIO.

ERROR TO THE SUPERIOR COURT OF CINCINNATI, STATE OF OHIO.

No. 491. Argued January 25, 1917.—Decided February 5, 1917.

When the highest state court has refused to exercise its discretion to review a judgment of an intermediate appellate tribunal, it is to the latter that the writ of error under Judicial Code, § 237, should be directed. *Stratton v. Stratton*, 239 U. S. 55; *Valley Steamship Co. v. Wallawa*, 241 U. S. 642.

The Ohio Court of Appeals affirmed a judgment of the Superior Court of Cincinnati, upon the record coming from the latter, and ordered that a special mandate be sent to that court "to carry this judgment into effect," without directing it to enter any judgment of its own. *Held*, that the writ of error under § 237 should have been directed to the Court of Appeals and not to the Superior Court.

THE case is stated in the opinion.

Mr. Landon L. Forchheimer, with whom *Mr. Ferdinand Jelke, Jr.*, was on the brief, for plaintiff in error.

Mr. Edward P. Moulinier for defendant in error.

Memorandum opinion by MR. JUSTICE DAY.

This writ of error must be dismissed. It appears from the record that the action was commenced in the Superior Court of Cincinnati to recover the sum of \$5,000.00 for money which, it was alleged, the Cincinnati Bank was to loan for the First National Bank of Okeana. Issues were made up and a trial had in the Superior Court, which resulted in a verdict and judgment against the Cincinnati Bank. Petition in error was filed and the case taken to the Court of Appeals, wherein it was heard upon the record, and the judgment of the Superior Court of Cincinnati was affirmed. After a general judgment of affirmance, the Court of Appeals ordered "that a special mandate be sent to the Superior Court of Cincinnati to carry this judgment into execution." An application by motion was made to the Supreme Court of Ohio to direct the Court of Appeals to certify its record to the Supreme Court for review. That motion was overruled.

Thereupon a petition for the allowance of a writ of error from this court was presented, which recited that the constitution and laws of the State of Ohio and the decision of the Supreme Court in *City of Akron v. Roth*, 88 Ohio St. 456, show that the Supreme Court of Ohio has no jurisdiction of the case in view of its refusal to direct the Court of Appeals to certify its record to that court, and that on February 1, 1916, the record of the case was returned to the Superior Court of Cincinnati with the mandate of the Court of Appeals affirming the judgment of the Superior Court of Cincinnati, and a writ of error was asked to bring up for review the order and judgment of the Superior Court. A writ of error was allowed and issued, running to the Superior Court of Cincinnati, reciting that it was the highest court of record in the State in which a decision in the cause could be had. In pursuance of that writ the record was certified from the Superior Court of Cincinnati to this court.

The Judicial Code, § 237, provides that a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity, etc., may be re-examined and reversed or affirmed in this court upon writ of error.

We are of opinion that in this case the writ of error should have been directed to the Court of Appeals, as that, under the constitution and laws of the State of Ohio, is the highest court in which a final judgment could be rendered in this case in view of the refusal of the Supreme Court of Ohio to grant the motion to certify to it the record of the Court of Appeals. *Stratton v. Stratton*, 239 U. S. 55; *Valley Steamship Co. v. Wattawa*, 241 U. S. 642.

By the new constitution of Ohio and subsequent legislation, a system of courts of original and appellate jurisdiction was established in that State. Section 1576, General Code, as amended, 103 Ohio Laws, 415, provides, among other things, that "the superior court of Cincinnati, in respect to the form and manner of all pleadings therein, and the force and effect of its judgments, orders, or decrees, is a court of general jurisdiction." Section 12247 provides that "a judgment rendered or final order made by a court of common pleas or by the superior court of Cincinnati, or by a judge of either of such courts, may be reversed, vacated or modified, by the court of appeals having jurisdiction in the county wherein the common pleas or superior court is located, for errors appearing on the record." Section 1684 provides that "the supreme court or the court of appeals may remand its final decrees, judgments, or orders, in cases brought before it on error or appeal, to the court below, for specific or general execution thereof, or to the inferior courts for further proceedings therein."

Reference to the record in this case shows that the Court of Appeals ordered "that a special mandate be sent to the Superior Court of Cincinnati to carry this judgment into execution;" that is, to carry into effect the judgment of the Court of Appeals. There was no direction that the Superior Court enter any judgment in the case; on the contrary, its judgment was specifically affirmed upon the record sent to the Court of Appeals, and the only mandate directed was to carry into effect in the Superior Court, by execution, the judgment of the Court of Appeals.

In this state of the record, it is clear that the writ of error in this case, when allowed, should have been directed to the Court of Appeals, requiring it to certify to this court its proceeding and judgment for review here, that court being the highest court of the State in which a judgment in the case could be rendered.

It follows that the writ of error in this case must be dismissed.

Dismissed.